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ABSTRACT

The first part of this report consists of the findings of the Citizens' Commission on Civil Rights on the record of the Clinton administration on civil rights. Six years into President Clinton's term, he continues to speak with understanding and empathy about the plight of people trapped in racial and ethnic isolation, but his administration has yet to provide clear direction with respect to civil rights. Some recommendations are made for policy to support equal opportunity. These include policies to renew the national commitment to civil rights and to address basic and critical needs such as nutrition, job training, and education. Major efforts are urged to ensure equal education, with re-examination of school segregation and attention to the needs of children of Limited English Proficiency (LEP). The second part of the report contains working papers prepared for this report by leading civil rights and public interest experts. Of the 22 chapters within part 2, there are 5 which concentrate on education. These chapters are: (1) "The Clinton Administration's Record on Equal Educational Opportunity in Elementary and Secondary Education" (Dennis Parker); (2) "Inclusion of Limited English Proficient Students in Title I: An Assessment of Current Practice" (Diane August, Dianne Piche, and Roger Rice); (3) "Federal Title VI Policy and LEP Pupils" (Peter D. Roos); (4) "Minority Access to Higher Education" (Deborah J. Wilds and Diane C. Hampton); and (5) "The Continuing Challenge: Gender Equity in Education and the Clinton Administration" (Verna L. Williams, Leslie T. Annexstein, and Needa Chaudhry). (SLD)

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The Test of Our Progress:

The Clinton Record on Civil Rights

Citizens' Commission on Civil Rights

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The Test of Our Progress:

The Clinton Record on Civil Rights

Corrine M. Yu and William L. Taylor, Editors

Report of the Citizens' Commission on Civil Rights

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Foreword

The Citizens' Commission on Civil Rights is a bipartisan organization established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

This study has two parts. Part One consists of the Report and Recommendations of the Commission. Part Two is a series of working papers prepared by leading civil rights and public interest experts, with some contributions by private practitioners. Several of these authors also contributed to the Commission's earlier studies of civil rights enforcement: *The Continuing Struggle: Civil Rights and the Clinton Administration* (1997), *New Challenges: The Civil Rights Record of the Clinton Administration at Mid-term* (1995), *New Opportunities: Civil Rights at a Crossroads* (1993), *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-term* (1991), and *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989).

The Commission gratefully acknowledges the support of the Ford Foundation for this study.

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Part One:

Report and Recommendations of the Citizens' Commission on Civil Rights

Chapter I

Introduction

I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction.
Testimony of Dr. Kenneth B. Clark before the Kerner Commission, 1968

Our Nation is moving toward two societies, one black, one white—separate and unequal.
Report of the National Advisory Commission on Civil Disorders (the Kerner Commission) (March 1, 1968)

America is resegregating. . . . Inner cities have become America's poorhouses, and millions of African-Americans and Hispanics, as well as a good number of American Indians and Asian Americans, are today almost locked into them, with little hope of escape.
The Millennium Breach: Richer, Poorer, and Racially Apart, A Thirty Year Update of the National Advisory Commission on Civil Disorders (March 1, 1998)

Thirty years after the release of the Kerner Report, we still must deal with its prophecy.

It is true that, since the Kerner Report, much has changed for the better in American society. Administrative and judicial enforcement of civil rights laws and affirmative remedies such as affirmative action and desegregation, federal assistance to disadvantaged children, and the lowering of voting barriers have all provided opportunities for advancement to those previously denied them. Civil rights guarantees have been strengthened and broadened to ban discrimination on the basis of gender, age, and disability, as well as race, religion, and national origin.

But, as documented in previous reports of the Citizens' Commission on Civil Rights, the 1980s were a period of regression in the implementation of laws and court decisions designed to end discrimination in major American institutions. The impact of government neglect and retrenchment could be seen in many areas: the newly widening gap between the scores of black and white children on achievement tests; continued, or growing, racial disparities in income; pervasive segregation in public schools and housing; and disturbingly high rates of poverty, particularly among the young and the elderly. As the economy lagged and federal assistance and concern waned, race relations worsened, with ugly racial incidents flaring in Miami, Florida, Forsythe County, Georgia, and in Howard Beach and Bensonhurst, New York—culminating in the 1992 disorders in Los Angeles following the acquittal in state court of the police officers accused of beating Rodney King.

In short, in a sobering confirmation of Dr. Clark's analysis, so much of what the Kerner Commission found wrong in 1968 remained wrong in 1993, when we marked the twenty-fifth anniversary of one of the most momentous years in the nation's long struggle for equal opportunity. To add to this, however, were the new challenges that had arisen in the intervening years and gone largely unattended. Particularly daunting was the plight of the minority poor, most of whom were locked in racially and economically isolated areas with little opportunity for advancement. When the Kerner Commission wrote in 1968, many of the country's central cities could still offer great opportunities for employment and economic advancement. By the early 1990s, employment and economic wealth had shifted to the suburbs, much of the employment base in metropolitan areas had become highly skilled (thus beyond the reach of young people poorly educated in city schools), and the movement of the middle class of all racial and ethnic groups out of cities had intensified.

This was the challenging situation that faced the new Clinton Administration as it took office. The election of Bill Clinton as President presented a new opportunity to set a course designed to give every American an equal chance to reap the rewards of living in America. But the difficulties of meeting the challenge should not be underestimated.

In the past two years, President Clinton has stepped up his public declarations that he wants to improve race relations and the plight of those who lack the access to services and opportunities that would make them full participants in society. Much has been made of the President's desire to leave a favorable legacy. There is little doubt that civil rights issues provide him with fertile ground.

The Commission's research indicates that if President Clinton exercises the necessary leadership, there is every reason to believe the nation will make more progress in the area of civil rights. Key findings of the Commission's recent (1997) survey of the civil rights awareness of American college students include:

- The resegregation of our colleges and universities is a great concern for college students. Sixty-four percent of those surveyed "strongly agree" with the statement: "It is important for colleges and universities to have racially diverse student bodies and faculties." Only 4% strongly disagree.

- More than half of those surveyed "strongly agree" that the federal government should play an active role in promoting (56%) and supporting (53%) civil rights.

- Only a few students (5%) "strongly agree" with the statement: "The United States is a colorblind society."

These findings directly contrast with the assertions of many conservative members of Congress and affirmative action opponents denying the importance of active civil rights efforts. Further, this data presents a hopeful sign that if the President is prepared to exercise the leadership to bring the diverse threads of America together, the next generation will be ready to follow.

Since the Kerner Report, we have learned how entrenched prejudice and fear remain in this nation and how they have perpetuated the legacy of discrimination. As President Clinton's own Advisory Board to the Initiative on Race has found:

> *Our Nation still struggles with the impact of its past policies, practices, and attitudes based on racial differences. Race and ethnicity still have profound impacts on the extent to which a person is fully included in American society and provided the equal opportunity and equal protections promised to all Americans. All of these characteristics continue to affect an individual's opportunity to receive an education, acquire the skills necessary to maintain a good job, have access to adequate health care, and receive equal justice under the law. . . . The data show that although minorities and people of color have made progress in terms of the indicators used to measure quality of life, persistent barriers to their full inclusion in American society remain.*[1]

The evidence of this can be seen in the indicators of social and economic well-being by race compiled by the Council of Economic Advisors for the Initiative on Race:

> *Race and ethnicity continue to be salient predictors of well-being in American Society. Blacks, Hispanics, and American Indians continue to experience educational disadvantages. Black and Hispanic children are more likely than non-Hispanic white children to be poor and to have parents with lower education levels. As a result, they often begin life with disadvantages related to family financial and educational resources.*[2]

It continues to be the view of the Commission that there is no more urgent task facing the President than explaining to the nation how these great concentrations of poverty and hopelessness that exist in cities and some rural areas disserve the interests of all Americans and developing a program of action at all levels of society to combat poverty, deprivation, and discrimination.

No one can deny that much progress has been made since the Kerner Commission made its dire predictions. But 30 years after the release of the Kerner Report, it is clear that many in our nation remain untouched by the civil rights laws and the access to service and opportunities that would make them full participants in society. Much evidence demonstrates that impediments to advancement still exist for our nation's minority populations. The chapters that follow test the progress of the Clinton Administration in restoring enforcement of the civil rights laws and reversing these trends.

Endnotes

[1] The President's Initiative on Race, *One America in the 21st Century: Forging a New Future*, at 2, 4 (Sep. 18, 1998).

[2] The Council of Economic Advisers, *Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin*, at 2 (Sep. 1998).

Chapter II

Presidential and Congressional Leadership in Civil Rights

With the election of Bill Clinton as President, the Citizens' Commission on Civil Rights wrote that "our nation has a new opportunity to realize our long-deferred goal of equality of opportunity."[1] At the mid-point of President Clinton's first term, the Commission identified the new challenges the Administration, Congress, and the American people faced in dealing with issues of equal opportunity and fair treatment.[2] At the conclusion of the first term and in the wake of the President's reelection, we called on the Administration and Congress to exercise leadership, educate citizens, and take the decisive action necessary to continue the struggle against discrimination in all its forms and manifestations.[3]

As previous Commission reports demonstrate, the course followed by the Clinton Administration has hardly followed a straight line. Now, six years into the President's term, while the President continues to speak with understanding and empathy about the plight of people trapped in racial and economic isolation, he and his Administration have yet to provide clear direction with respect to civil rights policy. As a result, what the Commission wrote in 1995 remains true today: "government is still very much in the beginning stages in revitalizing civil rights enforcement and in developing new policies to meet the needs of the 1990s."[4]

Contributing to the stalled momentum in civil rights enforcement were the changes resulting from the 1994 elections. In particular, the mid-term elections created great uncertainty as to whether there remained a cadre of Republicans in the new congressional leadership that was committed to continued progress in extending equality of opportunity.

What follows is our assessment of how the Clinton Administration and Congress have responded to the challenges and opportunities to move the nation forward in the area of civil rights.

I. The President

A. Early Actions

> *We must do what America does best: offer more opportunity to all and demand more responsibility from all . . . .*
> Inaugural Address of President Bill Clinton
> (January 1993)

President Clinton's early rhetoric presented hopeful signs that civil rights would become a national priority for his Administration. But, as the Commission wrote in 1995, "determining whether the new President's actions would match his earnest words"[5] would prove to be difficult. Promising early actions included the passage and signing of the National Voter Registration Act and the Family and Medical Leave Act; the issuance of Executive Orders calling for increased leadership and coordination in the development and implementation of fair housing and environmental justice policies and strategies; the appointment of the most diverse group ever of women and minorities to cabinet and other high-ranking positions; and the selection of judges who were significantly more diverse and experienced than the choices of his two immediate predecessors.

Yet the Administration's failure to move forward in several key areas would prove to be damaging to hopes that momentum in civil rights enforcement would be established. The Administration's delay in making key civil rights appointments created a leadership vacuum at civil rights agencies, causing the deferral of important policy decisions, and a backlog of issues for agency heads once they did finally assume office—but a limited window of time within which to deal with them. The White House's failure to provide clear guidance with respect to civil rights policy, or even to designate an official with civil rights responsibilities, also served to hamper effective civil rights enforcement. How the Administration would respond to the new challenges of the 1990s—the need for a comprehensive urban policy, the increasing tensions over legal and illegal immigration, the changes resulting from the 1994 elections, to name just a few—was also unclear. In short, as we concluded in 1995, even at the midpoint of the term, the Administration was only beginning to find its way, making it difficult to assess its effectiveness in achieving its civil rights objectives.

B. Mid-term Reactions

A moral imperative, a constitutional mandate, and a practical necessity.
Remarks of President Bill Clinton on Affirmative Action (July 1995)

The next two years were marked by a retreat from the activism of the first half of the term. Instead, President Clinton relied for the most part on the power of the veto and the bully pulpit as he sought to meet the challenges posed by the mid-term elections and the new Republican majority in Congress. Seeking to regain his political footing and adjust to the new congressional realignment, the President also made some remarkable turns to the right. In an accommodation to his opponents, and a reversal of long-entrenched domestic policies, President Clinton embraced his foes' call for a balanced budget, and the cuts in domestic spending that balancing the budget would require. Shifting into candidate mode, the President also retreated on the issue of welfare, signing into law a bill that ended welfare as an entitlement, allowed the termination of benefits even if jobs were unavailable to recipients, shifted much policymaking to the states, and eliminated many aid programs to the poor.

Yet the same President who declared big government to be "over" also demonstrated his facility with the bully pulpit to defend government activism, battle his opponents on budget cuts in core government education, health, and environmental programs, and announce a policy on affirmative action that would effectively depoliticize the debate over the issue. The President's spirited defense of affirmative action and essential government programs would ultimately pay critical dividends, with election exit polls indicating a rejection by voters of his opponents' anti-government stance. Nonetheless, President Clinton's political victories on such issues as welfare and the budget, evident in the wide margin he enjoyed in reelection, called into question his understanding of the critical role affirmative government could play to increase opportunities for full participation in American society.

As the Commission wrote in 1997, the President's political actions—clearly linked to his reelection campaign—left open the possibility of a "second term fix." Nonetheless, it remained unclear after the first term whether, despite the White House's obvious capacity to respond to a crisis when necessary, the Administration was capable of proposing and backing up policies and programs providing opportunity to those who still lack it.

C. "A Shining Example or a Stunning Rebuke"?

Today, I ask the American people to join me in a great national effort to perfect the promise of America for this new time as we seek to build our more perfect union . . . . That is the unfinished work of our time, to lift the burden of race and redeem the promise of America.
Remarks of President Bill Clinton on the Initiative on Race (June 1997)

Two years into the second term, we face anew a question that goes back to the early days of the Clinton presidency: is civil rights a national priority for his Administration?

Buoyed by his reelection victory, President Clinton again offered strong early rhetoric about the need to improve American race relations. The convening of a White House conference on hate crimes and the appointment of a blue ribbon advisory panel on race headed by noted historian John Hope Franklin suggested the elevation of the issue as a priority for the Administration. In addition, White House aides and others close to the President spoke openly about his desire to make racial reconciliation a primary legacy of his second term.

The standards that the President set for himself in the wake of the 1996 election were high, but as a second-term president with no concern about reelection, President Clinton seemed well-positioned to tackle the daunting issue of race. Beginning with his Inaugural Address, when he called the dismal state of race relations "America's constant curse," the President demonstrated a deep understanding of the issue in speech after speech. Opening his campaign of town hall meetings and conferences, the President stated in a commencement address at the University of California - San Diego:

> *We have torn down the barriers in our laws. . . . Now we must break down the barriers in our lives, our minds, and our hearts. . . . That is the unfinished work of our time—to lift the burden of race and redeem the promise of America.*[6]

Addressing the annual convention of the National Association of Black Journalists, the President said that new university admissions policies in California and Texas developed in response to anti-affirmative action decisions were of "great concern," moving the nation "in exactly the wrong direction." A few months later, in a speech commemorating the 40th anniversary of the desegregation of Central High School in Little Rock, Arkansas, the President declared:

> *It is a fact, my fellow Americans, that there are still too many places where opportunity for education and work are not equal, where disintegration of family and neighborhood make it more difficult.*
>
> *But it is also a fact that schools and neighborhoods and lives can be turned around if—but only if—we are prepared to do what it takes. . . . The rollback of affirmative action is slamming shut the doors of higher education on a new generation, while those who oppose [it] have not yet put forward any other alternative. . . .*
>
> *We have to decide, all you young people have to decide, will we stand as a shining example or a stunning rebuke to the world of tomorrow? For the alternative to integration is not isolation or a new separate but equal; it is disintegration.*[7]

But the Administration's actions did not mirror its rhetoric. Paralleling the leadership vacuum of the first term, the Administration again proved to be very slow in filling key civil rights positions. And although the President has demonstrated stunning political resiliency and an extraordinary facility with political survival tactics in the face of formidable challenges, his admittedly self-inflicted wounds have called into question his ability to use the power of moral authority to advance his cause.

Further, the means by which the President had initially hoped to leave his legacy on race—the work of the Advisory Board—would prove to be disappointing to many. Expectations for the President's Advisory Board on Race faded as the Administration became sidetracked by scandal, independent counsel investigations, and exhausting legal battles. The Board itself, despite its distinguished leadership, became an amorphous body, without a clear mandate from, or independent status conferred by, the White House. Hampered by a slow start, a fuzzy mandate, a lack of integration with other departments, political timidity on the part of the White House, and the muting of the President's expected leadership role, the Race Initiative's ambitious goals would not be met. Instead, the

Advisory Board's report, the product of hundreds of meetings and conferences and the culmination of its 15-month tenure, would turn out to be only a small step along the road of racial reconciliation, not the great leap originally envisioned.

The importance of even a small step should not be underestimated, however. Certainly the words of a group of distinguished citizens headed by John Hope Franklin can be widely viewed as free from the taint of politics in a way that the views of any Administration official—even the President—cannot. Like the Kerner Report, the Advisory Board's report can be viewed as an aspirational document, setting standards that become reference points for years. Nonetheless, the Race Initiative example has caused many to wonder if the Administration is willing to back up its strong rhetoric with a positive agenda.

In the wake of an election that in President Clinton's own words "is very important to me because it will determine how much I can do for the American people in the next two years," the Commission urges the President to make civil rights a national priority again. Our report also renews our earlier calls to the President to redirect the nation's energies from the divisiveness of the last decade, and recommends action that the executive branch should take to frame positive civil rights policies and assure strong enforcement.

II. Congress

The second session of the Republican-led 105th Congress opened with what appeared to be a new spirit of cooperation, as exemplified by the achievement of a bipartisan agreement to balance the federal budget for the first time in 30 years.

But the remainder of the session was marked by an intense partisanship and an often poisonous atmosphere. The political ill will was particularly evident with respect to the blocked nomination of Bill Lann Lee as Assistant Attorney General of the Department of Justice's Civil Rights Division, the most important civil rights law enforcement post in the federal government. Republican senators who opposed the Lee nomination did so because of the Administration's position on affirmative action, which Lee supported. In other demonstrations of sharp partisanship, Republicans stalled the nomination of the Administration's choice for Surgeon General over his stance on abortion, as well as the nomination of one of their own party, former Massachusetts Governor William Weld, as ambassador to Mexico. The politicization of the confirmation process would help produce an ominous backlog not only in executive appointments, but in key judicial appointments as well.

The ugly atmosphere was foreshadowed by the reprimand and fine of House Speaker Newt Gingrich for ethics violations in the early days of the first session, and confirmed by the House vote to open a formal impeachment inquiry of the President as the second session drew to a close. In between, it helped contribute to a remarkably lackluster legislative record. While divided government certainly exacerbated partisan rivalries, it does not completely explain Congress's lack of productivity. Indeed, much of the political bickering seemed to be occurring within party ranks. The political infighting would continue even after the impeachment inquiry vote, as the President and the Democrats won victories in budget negotiations that seemed improbable only a few weeks earlier. In the end, anger and dissatisfaction over the handling of the budget agreement, as well as the results of the 1998 elections, where the Republican edge was narrowed, would lead to upheaval in the Republican leadership.

In the area of civil rights, Congress's record was decidedly mixed. On the one hand, Congress failed to move forward with a civil rights agenda, considering, but not passing, such important legislation as the Employment Non-Discrimination Act (which would have banned employment discrimination based on sexual orientation) and the Hate Crimes Prevention Act (which would have amended the principal federal criminal civil rights statute to address violent attacks on persons based on race, color, national origin, religion, sexual orientation, gender, or disability). Congress also used its oversight powers to try to constrain the enforcement efforts of civil rights agencies such as the Department of Justice's Civil Rights Division and the Department of Education's Office for Civil Rights. In addition, congressional action with respect to the upcoming census was clearly hostile to minority interests.

On the other hand, anti-civil rights efforts, most notably in the area of affirmative action, failed. All three legislative battles involving anti-affirmative action legislation (the Canady bill, which would have banned all affirmative action at the federal level; the McConnell Amendment to kill the Department of Transportation's Disadvantaged Business Enterprise Program; and the Riggs Amendment to end affirmative action in higher education) resulted in defeat for affirmative action opponents. Certainly, at least a partial reason for these results was the reluctance of some Republican legislators to face the political consequences of alienating minority and female voters. In another important step, Congress capped off its session with the approval of a budget that included the largest increase in funding for civil rights enforcement in two decades.

The changes in Congress raise new questions about the direction of the Republican social agenda and the continued viability of its "Contract with America." With new leadership, it remains to be seen whether Congress will return to the bipartisanship that made possible the many gains in equal opportunity over the past three decades. The Commission offers this report to Congress in the hope that it will assist in addressing the steps that must be taken to once again set the nation on the path to equality of opportunity.

III. The Test of Our Progress: Clinton and the Poor

Civil rights and race relations at the end of the 20th century present a variegated, complex, and often confusing picture.

The civil rights revolution of the last half-century changed the face of the United States in ways unlikely to be reversed. Freed from the bonds of both legalized and informal caste systems by their own successful efforts in the courts, in Congress, and in the streets, African Americans seized the opportunities for education and employment that became available to them, and by dint of hard work forged a substantial middle class. Other people of color, women, and disabled people struggled successfully to end discriminatory practices and to advance.

Yet somewhere along the way progress stalled. The gains that African Americans and Latinos made in the 1960s and 1970s in closing the earnings gap with whites stopped and erosion set in. The gap in family wealth created during the many years when blatant discrimination depressed the income of people of color, and prevented them from purchasing homes and building equity, continued and became a chasm. The impressive gains that had enabled black and Latino students to close the academic performance gap with their white peers persisted until the end of the 1980s, and then the gap began to widen again.

Opinion surveys show that the gross forms of racial prejudice that had persisted for many years have abated over the past three decades. Yet the often-expressed belief among whites that discrimination is a thing of the past conflicts with evidence that in employment, housing, and education, as well as in the administration of justice and other areas, such practices continue on a wholesale basis. This skewed view of reality that many whites hold has rankled African Americans, including those who no longer feel the blunt force of racism themselves, but who are painfully aware of its impact on many of their fellow citizens. Increased immigration and the growing diversity of the nation have also made the task of easing racial tensions more complex. In many cases, members of minority communities have found themselves at odds as they struggle over diminishing resources.

So, paradoxically, while overt prejudice has diminished, race relations continue to be strained. President Clinton, aware of the dangers posed by such division, has made racial reconciliation an important concern of his Administration. He has employed his considerable skills as a communicator to try to give Americans a deeper understanding of America's race problem and has sought, through his Race Initiative, to identify institutions at all levels where citizens can meet to mediate difficulties and improve understanding.

But many of these efforts are frustrated by the physical as well as the psychological barriers that separate people by race and socio-economic status. While the boundaries that constrain mobility have become more permeable for some, for others they have become more rigid and confining.

At the end of the century, the dominant civil rights problem in this nation is the persistence of *racial and socio-economic isolation*. While too many Americans of all groups live in poverty, it is people of color—African Americans and, to a substantial degree, Latino Americans—who live in conditions of concentrated poverty. There is a difference. Those who live in concentrated poverty generally lack access to good schools and good teaching, to the acquisition of higher education or needed job skills, and to employment opportunities. Instead, they are exposed to physical and environmental hazards, to crime, and to other forms of social pathology that often make daily survival a struggle. Racial and socio-economic isolation perpetuate concentrated poverty. Study after study shows that a poor person who is not so isolated and cut off from opportunity has a far better chance, than one who is so constrained, of extricating himself from poverty.

We submit that the question that should be posed to the Clinton Administration (and that the Administration should ask itself) is whether it has a set of policies that offer effective assistance to those who are mired in concentrated poverty—the people who are worst off in this society. The answer is largely negative. While the President has mounted a stalwart defense of affirmative action, and while affirmative action policies have enabled substantial numbers of people to acquire higher education and entry jobs that have provided mobility, few would argue that this is a sufficient anti-poverty strategy. While the President has proclaimed that the alternative to school integration is disintegration, the courts are moving toward resegregation and the Administration has yet to mount a program that would preserve and extend the documented benefits of school desegregation. While packing people into high-rise public housing is widely acknowledged to be a failed policy (punctuated periodically by the dynamiting of Robert Taylor homes), no wide-scale alternatives for adequate shelter have emerged. And while experience has shown that scatter-site housing often provides poor people not only with decent shelter but with access to better schools, better services, and job opportunities, the Administration has yet to propose federal investments in these proven programs except at minimal levels.

The Administration has failed to support efforts to provide access to opportunity through integration. Nor has it supported effective efforts to revitalize the inner city and rescue its inhabitants. President Clinton has succeeded in his pledge to "end welfare as we know it," but large numbers of people are being terminated from programs without having any access to the job training or education they need to become self-sufficient, or to the jobs they need to survive. While President Clinton clearly has a strong belief in public education, he has addressed in only peripheral ways the critical need to attract able people to teaching and to provide the incentives and support needed to induce the best teachers to commit to service in the schools that most need their assistance. Nor has his Administration asked states to redress the gross inequities in resources that disadvantage poor and minority children throughout the country, dismissing such initiatives as calling for "unfunded federal mandates."

Surely, an effort to develop and implement comprehensive measures to provide opportunity to those who remain mired in poverty and discrimination will present a formidable challenge. Public acceptance and support will not be forthcoming automatically. But the President might ask affluent Americans to consider the question: "What would be my chances of success if I were born today in the inner city in poverty, without strong family or community supports and in an environment of despair?" Appeals at the highest levels to the sense of fairness of the American people have often brought a positive response. There is no better time to launch the effort: the nation is more prosperous now than it has ever been. Claims that we cannot afford to invest in opportunity for all our citizens simply lack credibility.

If the Administration were to undertake such an effort, it could make only a beginning in the time remaining. But what it does or fails to do over the next two years is likely to determine whether the racial lines harden and the gulf between "haves" and "have nots" continues to widen, or whether we move toward a new era of equal opportunity. In the words of Franklin Roosevelt:

> *The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.*

Endnotes

[1] Citizens' Commission on Civil Rights, *New Opportunities: Civil Rights at a Crossroad*, at 2 (1993).
[2] Citizens' Commission on Civil Rights, *New Challenges: The Civil Rights Record of the Clinton Administration Mid-term* (1995) (hereinafter "*New Challenges*").
[3] Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration* (1997).
[4] *New Challenges, supra* note 2, at 16.
[5] *Id.* at 4.
[6] Peter Baker, "Clinton Sounds Call for Dialogue on Race," *The Washington Post*, June 15, 1997.
[7] "Excerpts from President's Comments on School Desegregation," *The New York Times*, Sep. 26, 1997.
[8] Franklin Delano Roosevelt, Second Inaugural Address, January 20, 1937, in Davis Newton Lott, ed., *The Inaugural Addresses of the American Presidents from Washington to Kennedy*, at 239-40 (New York: Holt, Rinehart and Winston, 1961).

Chapter III

Recommendations of the Commission

The Commission offers the following recommendations designed to make tangible the promise of equal opportunity:

Presidential Leadership and Appointments

1. Reaffirm the National Commitment to Equal Opportunity

> *We recommend that the President reaffirm our national commitment to equal opportunity for all Americans by exercising moral leadership to bring the diverse threads of America together.*

In our 1993 report, the Commission urged the new President to help reestablish a national consensus that every American should be given the opportunity to succeed. Six years later, faced with strong evidence of continuing discrimination and intergroup conflict, we renew our recommendation, and urge President Clinton to make assuring equality of opportunity for all persons one of his Administration's highest priorities for the remainder of the second term. The President has spoken openly about his desire to tackle the daunting issue of race, and his appointment of a blue ribbon panel to address the issue was an important step in this direction, as was the increase in funding for civil rights enforcement contained in the FY1999 budget the President signed into law. Nonetheless, there is much more that he and his Administration can do, even in the little time remaining in the term, to move the nation forward in the civil rights area. Strong enforcement of civil rights laws and support for the enactment of other legislation are essential to provide access to equal opportunity.

2. Support the Efforts of the Civil Rights Working Group

> *We recommend that the President renew the mandate of the Civil Rights Working Group that he created last term and make support for the Group's work a high priority for his Administration.*

In our previous reports, the Commission urged the President to establish an interagency, Cabinet-level task force to address immediately the problems of intergroup tensions and conflicts, and to develop and submit to him within 60 days a coordinated action plan for dealing with the causes and consequences of these conflicts. We recommended further that this task force include representatives from the Executive Office of the President, the heads of all Departments, as well as representatives from the U.S. Civil Rights Commission and the Equal Employment Opportunity Commission.

In our 1995 report, we noted that the Administration had addressed one part of this recommendation by establishing a Civil Rights Working Group, whose mission is to "identify barriers to equal access, impediments to effective enforcement of the law, and effective strategies to promote tolerance and understanding in our communities and workplaces" and to otherwise "evaluate and improve the effectiveness of Federal civil rights enforcement missions and policies." Named as co-chairs of the Working Group were the Attorney General and the Director of the Office of Management and Budget, with the following Administration officials serving as members: Secretary of the Treasury, Secretary of Commerce, Secretary of Agriculture, Secretary of the Interior, Secretary of Education, Secretary of HHS, Secretary of HUD, Secretary of Labor, Secretary of Transportation, Secretary of Veterans Affairs, Administrator of EPA, Chair of the EEOC, Assistant to the President for Economic Policy, Assistant to the President for Domestic Policy, and the Assistant to the President and Director of Public Liaison. The President also invited the Chairperson of the U.S. Commission on Civil Rights to participate on an informal basis, as well as encouraged all Cabinet officers and agency heads to participate.

In his Executive Order establishing the Working Group, the President directed the Group to "advise appropriate Administration officials and me on how we might modify Federal laws and policies to strengthen protection under the laws and on how to improve coordination of the vast array of Federal programs that directly or indirectly affect civil rights," and to provide a progress report regarding its activities no less often than every six months.

Although the President is to be commended for establishing the Working Group, it is clear that the Group has fallen short of its directives and designated time frames. The need for such an interagency task force still exists. In particular, the Group could take the lead in identifying and seeking solutions to the critical problems confronting our nation in the area of civil rights. Specific issues that the Group could address include threats to civil rights remedies (such as those posed by state and federal efforts to roll back affirmative action programs and policies), the growing racial and socio-economic isolation of America's poorest citizens, the continuing problem of intergroup conflicts, and the need to educate immigrants (as well as those born in the United States) about the history of race relations in this country. In addition to serving as a forum to address these issues on an ongoing basis, the Group could also play an important function with respect to problems that require interagency action and cooperation.

3. Designate a White House Official with Responsibility for Civil Rights Policy

We recommend that the President vest civil rights responsibility with an official in the White House who reports directly to the President. This official's responsibility should include providing guidance and direction to agency and department heads.

In our prior reports, the Commission wrote that one manifestation of the White House's failure to provide clear direction on civil rights policy is the absence of a person at the White House with designated civil rights responsibility who reports directly to the President.

After six years, this gap continues to be a glaring one. Most recently, an individual has been appointed in the Counsel's office to deal with civil rights issues, but he does not report directly to the President. A senior-level official, whose sole responsibility is civil rights, is needed to help develop a comprehensive policy to provide opportunities to those trapped by poverty and discrimination in cities throughout the nation. Such a person is needed more than ever to provide coordination where civil rights issues cross policy lines, and to provide guidance and, on occasion, political assistance where civil rights issues are controversial or sensitive. This individual should also be asked to play a leadership role with respect to the Civil Rights Working Group described above.

4. Appoint Judges Committed to Equal Justice Under Law

We recommend that the President require his judicial nominees to share his commitment to equal justice under law. We also urge the President to continue his pledge for diversity in his judicial appointments by including in his selections qualified women and minorities committed to equal justice under law. We recommend further that Congress give more prompt consideration of nominees on a consistent basis, par-

ticularly in the case of minority and female nominees.

The President has already named a good many highly qualified and distinguished attorneys to the federal courts who reflect the diversity of America and share his commitment to equal justice under law. Even so, for various reasons, including a reluctance to nominate or support candidates thought to be "controversial," as well as delays in the nomination and confirmation process, the President has hardly made a dent in the largely conservative judiciary appointed by his Republican predecessors.

It is important that vacancies be filled with qualified women and minorities who share the President's commitment to equal justice under law. The President should consider people with varying backgrounds and views, provided they have a commitment to equal justice under law. It is especially important that minorities be appointed to some of the vacancies in the Fourth and Ninth Circuits, where large numbers of minority Americans live, but where there has been a dearth of minority judges. The President should also avoid backing away from potential nominees with distinguished records and a strong commitment to equal opportunity simply because they may be controversial.

It is also critical that the Republican leadership in the Senate abandon the tactics of delay and unfair opposition that politicized the process in the last two terms and return to the bipartisanship that has historically characterized the nominations process.

5. Develop a Comprehensive Policy to Provide Opportunity to Economically Disadvantaged Citizens

We recommend that the President develop a comprehensive policy designed to provide opportunity to economically disadvantaged citizens, particularly minorities who live in high concentrations of poverty in inner cities, as well as the poor in rural areas.

In earlier reports, the Commission wrote that almost all of the public discussion about inner cities centers on pathology and concerns proposals to institute punitive measures such as cutoffs of welfare benefits to unmarried mothers and more stringent sentences for repeat criminal offenders. Whatever the merits of such proposals may be, they deal almost exclusively with how to deal with problems after they have arisen, rather than with prevention. Accordingly, we stated that it was vitally important that the new Clinton Administration develop and present an alternative (or complementary) vision.

The President and Administration officials (most notably HUD Secretary Andrew Cuomo) have spoken of the need to address the problems of the inner cities, and have offered modest proposals toward this end. It remains to be seen whether the Administration can mesh these and other initiatives into a comprehensive policy to help the most economically disadvantaged.

This policy should address such basic and critical needs as immunization and health treatment, adequate nutrition, job training, and education. It should deal with housing opportunities in cities and suburbs and how economically disadvantaged citizens will be given access to public services on terms that will give them the same kinds of opportunities as those enjoyed by the more affluent. It should also address how economic measures such as empowerment zones will provide effective incentives for job creation in inner cities. It should include the kinds of incentives and support that can attract the most able individuals to teaching and keep them in the schools that most need their assistance. It should also provide opportunities to poor children to transfer out of failing schools into schools, whether in the city or in the suburbs, that are successful. President Clinton should also discuss candidly the barriers that continued racial prejudice and misunderstanding pose to constructive solutions to our urban problems and the ways in which we can surmount barriers of racial prejudice and fear.

It is also essential that this comprehensive strategy take into account the particular barriers that exist for the rural poor, with an overall goal of assisting the poor in rural areas to achieve long-term economic self-sufficiency.

6. Promote Public and Private Efforts to Meet Challenges Posed by Intergroup Tensions and Conflicts

We recommend that the President use his bully pulpit to promote public and private efforts to meet the challenges posed by intergroup tensions and conflicts and hate violence. He and his cabinet, especially the Departments of Justice and Education, should identify, develop, and fund initiatives that have been successful in reducing prejudice, building democracy, and other training and education outreach measures designed to address the causes and consequences of these conflicts.

In previous reports, the Commission stated that the dismal state of ethnic and race relations was a critical domestic issue confronting the nation, and noted that the growing tensions between groups threatened to undermine the nation's economic and moral progress.

The problems of intergroup tensions and conflicts have, if anything, grown worse and need to be addressed even more urgently. The President's Initiative on Race and the November 1997 White House Conference on Hate Crimes played important roles in the search for ways to build a more united America. The U.S. Commission on Civil Rights and the Department of Justice's Community Relations Service, as well as other agencies, also have roles to play in addressing the causes and consequences of intergroup tensions and conflicts. Private organizations (including this Commission and civil rights and advocacy organizations) certainly would respond to a call to provide assistance in this effort.

7. Revitalize the Equal Employment Opportunity Commission

We recommend that the President make revitalization of the Equal Employment Opportunity Commission a high priority for his Administration.

While the Clinton Administration made a good beginning in its efforts to revitalize the Equal Employment Opportunity Commission, much more can be done to fully revitalize the nation's lead EEO enforcement agency. First, EEOC leadership should commit themselves, beyond making public statements and directives, to using systemic approaches to law enforcement, such as class action lawsuits. In working up its investigations and charges, the Commission should actively use employment "testers" as an additional tool for investigating and uncovering systemic discrimination. Second, the EEOC must ensure that its ADR programs are accompanied by appropriate safeguards to ensure fairness to discrimination victims. Third, the EEOC should issue guidance to employers about unresolved issues relating to employment protections. Finally, the EEOC should take assertive positions in its regulations, policy guidelines, and litigation to ensure that federal anti-discrimination laws accomplish their remedial purposes.

8. Restructure the U.S. Commission on Civil Rights

We recommend that the President make restructuring the United States Commission on Civil Rights a high priority for his Administration.

A strong, independent, bipartisan United States Commission on Civil Rights could make an important contribution to monitoring federal civil rights enforcement and could help shape the future direction of federal policy that seeks to provide equal opportunity for all Americans. During the 1960s and 1970s, the Commission, with bipartisan support, served as America's conscience to help remedy decades of injustice; but under the current structure, the Commission has lost much of its effectiveness. A restructured Commission could again become a significant voice in identifying and seeking solutions to the critical problems confronting our nation in the field of civil rights.

President Clinton should support additional funding for a restructured agency, as well as oppose legislative efforts to restrict the tools—such as its fact-finding powers—needed by the Commission to perform its mission.

Federal Civil Rights Policies and Remedies

9. Provide Necessary Tools for Enforcement

We recommend that the President send a clear message to all federal departments and agencies that he expects civil rights laws to be vigorously enforced. It is also imperative that the agencies have the tools needed for effective law enforcement and implementation of appropriate monitoring and information collection policies.

The decline of civil rights enforcement during the 1980s was marked by a diminution of resources for law enforcement, failures to investigate and monitor, and the failure by enforcement agencies to collect the data necessary to assess compliance with civil rights laws.

Effective law enforcement is not possible without adequate resources. A critical task for the Clinton Administration during the remainder of the second term is to ensure that the civil rights law enforcement agencies have the tools needed to perform their mission. An important aspect of the challenge is to ensure that civil rights protections are afforded in programs such as welfare where power and responsibility have devolved to the states through block grants.

This does not necessarily mean significant increases in agency appropriations, although certainly the recent funding increase contained in the 1999 budget is a step in the right direction. When statistical data is collected and analyzed properly, the agencies may detect patterns or practices that can be investigated and resolved more efficiently than on a complaint-by-complaint basis. When agencies establish effective mechanisms for early resolution of cases through conciliation or other means of alternative dispute resolution, they save the costs of later investigation and enforcement. When department and agency heads provide clear regulatory guidance on the steps needed to comply with the law and make clear their willingness to employ sanctions against violators, many institutions will comply without the need for protracted agency litigation.

In addition, investment in the professional development needed to ensure that staff possess skills in statistical analysis, negotiation, dispute resolution, and other areas will pay dividends in cost-effective performance.

In the end, of course, ineffective enforcement that permits discrimination to continue causes additional economic loss to the nation in wasted potential.

10. Use Affirmative Remedies for Violations of Civil Rights Laws and Encourage Use of Affirmative Action Plans

We recommend that the President direct federal departments and agencies to continue to use affirmative remedies for violations of the civil rights laws and to encourage the use of voluntary affirmative action plans. In turn, federal departments and agencies (particularly the Office of Federal Contract Compliance Programs) should continue their vigorous defense of affirmative action and should resist efforts to undermine the reach of the Executive Order program. The Administration can reinforce these actions by calling on business and education leaders to seek means to demonstrate the importance of affirmative action in the workplace and on college campuses.

In its 1995 and 1997 reports, the Commission wrote that after years of bipartisan support, federal affirmative action policy recently had become politicized. Today, although supported by the Clinton Administration, the utility of affirmative action as a remedial tool is being undermined by attacks on the concept by the courts as well as by federal and state legislatures. Recently, voters in Washington state passed Initiative 200, which threatens to end all non-court-ordered state affirmative action programs in public education, employment, and contracting. In the wake of Initiative 200's passage, it is expected that affirmative action opponents in other states will seek to offer or revive similar state initiatives.

President Clinton has concluded that affirmative action works and, moreover, that society cannot afford the costs of its abandonment. He and his Administration have taken strong and reasoned positions in defense of the policy. The Commission recommends that the President send a clear message to all federal departments and agencies that he expects them to enforce and defend civil rights laws and affirmative action remedies. We also urge the President to work closely with leaders in the private sector, who can play an important role in creating a greater awareness of the basis and the need for affirmative action policies and programs.

11. Further Equal Educational Opportunities

We recommend that the President and the Administration undertake major efforts to improve educational opportunity. In particular, the following steps should be taken:

a. Provide guidance on the appropriate criteria for deciding whether school districts have reached unitary status.

As the Commission has noted in previous studies, school desegregation remedies, when properly implemented, have been an important tool in improving the educational performance of minority children and providing them with access to higher education and employment opportunities. To permit a return to segregation would place major barriers in the path of the Clinton Administration's professed goal of preparing all children for the education and employment challenges of the next century. The Departments of Justice and Education should provide guidance on the appropriate criteria for deciding whether school districts have reached unitary status. Such guidance should make clear that states and school districts are responsible for eliminating, as far as practicable, the housing and education vestiges of segregation.

b. Preserve voluntary desegregation against attack.

There is a small but growing number of lawsuits in which parents in districts that have achieved unitary status (or that were never under court order) are attacking voluntarily adopted plans for magnet schools on grounds that racial balancing is impermissible. Since the available evidence suggests that magnet programs, like other desegregation initiatives, serve to enhance the achievement of poor and minority students, efforts should be made to prevent them from being dismantled.

c. Institute an investigation of the ways in which in-school segregation denies equal educational opportunity to minority students, and provide guidance to states and local school districts on how to eliminate violations and substitute nondiscriminatory policies that are educationally sound.

In-school segregation is an acute problem even in school districts that have been under court order to desegregate school buildings. Devices that easily lead to in-school segregation include tracking and other forms of ability-grouping, which result in isolation of students for significant portions of the school day on the basis of race and socio-economic status. With few exceptions, ability-grouping routinely denies educational opportunity to children of color, limited English proficient children, and children from low-income families, for these children are disproportionately tracked into lower-achieving classes. Moreover, despite the President's high-profile campaign to end "social promotions," evidence suggests that retention of children in grade is widespread and has been increasing in recent years. Here, too, the practice has an adverse racial impact and contributes to high school dropout rates. The President must begin to address this situation.

d. *Call on education leaders to promote "best practices" in the classification area.*

Many educators now agree that neither retention in grade nor social promotion is a good option. They understand that what is needed instead is intensive educational improvement efforts (including summer school) at key points for students who have fallen behind. The Clinton Administration should look for ways to engage education leaders on these issues, particularly with respect to how better understanding of what constitutes "best practices" in the classification area can be promoted.

e. *Vigorously monitor implementation of the provisions of the Elementary and Secondary Education Act designed to ensure that children with limited English proficiency (LEP) are not denied educational services under Title I.*

Despite the fact that they are eligible for educational services, there is evidence that language minority students are not being adequately served. For example, in many instances, language minority students are inappropriately placed in special education classes solely because of their limited English language skills. Often school districts incorrectly assume that help for LEP children in reading is being afforded through bilingual programs and that Title I resources need not be made available. Accordingly, the federal government must take the lead in vigorously monitoring implementation of new provisions of the Elementary and Secondary Education Act designed to ensure that LEP children are not denied the educational services to which they are entitled.

f. *Issue regulations and guidelines to ensure that federally funded charter schools provide real access to poor and minority children, avoid racial and socio-economic isolation, and are held accountable for results.*

The Clinton Administration has failed so far to establish basic ground rules of equal opportunity in distributing charter school grants. If charters are to be counted successful, they must be required to serve children with disabilities or other special needs and poor children. Nor should they be allowed to become vehicles for racial resegregation. A further critical question is who will hold charters accountable for educational progress and revoke the charter when a school fails to produce. Regulations and guidelines should be issued immediately.

12. Ensure Electoral Equality

We recommend that the Department of Justice continue to aggressively enforce and defend the Voting Rights Act and the National Voter Registration Act.

We urge the Justice Department to continue to defend vigorously minority opportunity districts in court, as well as to press its challenges to districting systems that systematically prohibit minority communities from electing candidates of their choice. The Department should also participate in cases involving state districts which raise similar issues. We also urge the Department to educate the public on the continuing need for positive action on voting rights. The Department should also consider, in appropriate circumstances, encouraging the exploration of alternatives such as multimember districts that utilize cumulative voting mechanisms.

The National Voter Registration Act has succeeded in expanding voter rolls, although it is clear that community outreach efforts are needed to inform newly registered voters how to exercise their rights once registered. Moreover, although the Clinton Administration has successfully defended the Act against challenges, it remains critical for the Administration not only to ensure compliance with the Act, but also to aggressively defend against efforts to nullify the Act's protections.

13. Protect the Rights of Language Minorities

We recommend that the Clinton Administration make efforts to protect the rights of language minorities a national priority.

With the rise in immigration there has been a resurgence of nativism, manifested in part by legislative efforts to repress foreign languages. Proficiency in English is an essential attribute of citizenship. But care must be taken to ensure that such efforts do not create new barriers for citizens not yet proficient in English, or hinder such rights and duties of citizenship as voting or receiving essential government services. For example, efforts to abolish bilingual voting provisions and to restrict educational programs that make some instructional use of a student's native language serve to exacerbate tensions without accomplishing legitimate objectives. The educational effects of legislation such as California's Proposition 227 on language minority students will no doubt prove to be detrimental.

The Clinton Administration must step up its efforts to address the critical needs of the rapidly increasing number of language minorities and to maintain the programs that are needed to give these Americans access to the equal opportunity promised by civil rights laws. Moreover, in recognition of the role language restrictions can play in national origin discrimination, the enforcement of civil rights laws designed to protect the rights of language minorities must become a national priority.

14. Ensure a Fair and Accurate Census

We recommend that the Clinton Administration support efforts to ensure a fair and accurate census in 2000.

Following the 1990 census, there was agreement among members of Congress, Census Bureau officials, and professional statisticians that the next decennial count in 2000 had to be more accurate and less costly. The Census Bureau's plan for the 2000 census addresses the deficiencies of the 1990 census by combining an aggressive counting effort with modern scientific sampling methods. Although the Bureau's Census 2000 plan has been endorsed by a broad range of professional and scientific associations and organizations, it has encountered fierce opposition from the congressional majority. The fate of the Census Bureau's plan to augment direct counting with statistical sampling will depend, in large part, on the resolve of the President and the Administration to stand firm in the face of the partisan assault on census methods and operations.

New Legislative Remedies

15. Close the Minority Health Gap

We recommend that the President make improving minority health and closing the health gap between whites and minorities a national priority.

Because minority Americans are less likely than other groups to be covered by private health plans, universal health benefits coverage should have a substantially beneficial impact on minorities, expand their access to health care, and thereby help reduce the health gap.

Since the setback imposed by his earlier failure to enact a broad-ranging health care initiative, the President has moved incrementally, supporting, for example, a bill that allows workers to maintain insurance coverage if they lose or leave their jobs. More recently, a new children's health insurance program was created that will invest billions to extend insurance to children of low-income families for the next several years. But health coverage continues to be out of the reach of too many Americans. We urge the President to demonstrate his commitment to minority health care by proposing measures that will address the critical health needs of the poor and disadvantaged.

16. Ensure that New Legislation Does Not Impair Civil Rights Programs and Safeguards

We recommend that Congress take steps to ensure that legislation designed to reduce regulation or accomplish other legitimate legislative objectives does not impair civil rights programs and safeguards.

Legislation designed to reduce regulation or accomplish other legitimate objectives may have the effect of impairing civil rights enforcement and the realization of equal opportunity. For example, proposals to reduce the paperwork burden of private industry may prevent the collection of racial and ethnic data needed to enforce the civil rights laws. The congressional leadership should establish procedures for examining all legislation to which it wishes to give priority, to ascertain its effect on civil rights. Where there is a potential adverse impact, the legislation should be deferred until adequate civil rights protections are devised.

17. Support Passage of Legislation on Equal Employment Opportunity, Equal Remedies, and Justice for Wards Cove Workers

We recommend that the President support passage of the following civil rights legislation:

a. The Employment Non-Discrimination Act

The Employment Non-Discrimination Act is new legislation modeled after Title VII of the Civil Rights Act of 1964 and is designed to cover the same entities as Title VII without disturbing Title VII's protections against discrimination based on race, color, national origin, gender, and religion. The Act prohibits employers from discriminating against any employee, gay or heterosexual, based on that employee's perceived or actual sexual orientation. (Unlike Title VII, however, employers would not be required to justify neutral practices that have a disparate impact on people of a particular sexual orientation or to engage in affirmative action.)

The Act has received support from an impressive coalition of civil rights groups, gay rights groups, religious groups, women's groups, and Democratic and Republican members of Congress. Endorsement of the Act would demonstrate a firm commitment to ensuring and expanding equal employment opportunity for all.

b. The Equal Remedies Act

The Equal Remedies Act would ensure that victims of intentional, on-the-job discrimination on the basis of gender, religion, and disability receive full damages to compensate their losses. The Civil Rights Act of 1991 places an arbitrary cap on damages for victims of such discrimination—a cap that does not exist for victims of race or national origin discrimination. The Equal Remedies Act will remove the damages cap and so establish for all groups the full range of remedies that only some now enjoy. The availability of damages coupled with stronger alternative dispute resolution procedures at the EEOC may provide real incentives for out-of-court settlements of meritorious discrimination claims.

c. The Justice for Wards Cove Act

The Justice for Wards Cove Act is also designed to eliminate a loophole created by the Civil Rights Act of 1991. The 1991 Civil Rights Act reversed the Supreme Court's 1989 *Wards Cove* decision for all Title VII claims except for those of the original plaintiffs in that case. Simple fairness requires that the Wards Cove workers be covered by the new legal standard created by the Civil Rights Act of 1991 and receive the protection of that law.

Finally, we recommend that the President, the Congress, the Attorney General, the Assistant Attorney General for Civil Rights, the Secretaries of the

Departments of Health and Human Services and Housing and Urban Development, and the Chairs of the Equal Employment Opportunity Commission and the U.S. Commission on Civil Rights, and other appropriate subcabinet and agency officials review and give serious consideration to the recommendations of the authors of the working papers in Part Two of this report.

Part Two:

Working Papers

Chapter IV

Racism and the Poor: Desegregation and Affirmative Action as Mobility Strategies[1]

by William L. Taylor

Introduction

In March 1968, the Kerner Commission issued its report warning of the dangers of a nation divided into two societies, separate and unequal.[2] Less than a month later, Dr. Martin Luther King, Jr., the most eloquent and persuasive voice in the effort to break down the walls of segregation and establish racial and social justice, was dead, struck down by an assassin.

Ever since, those who have sought to keep Dr. King's dream alive have had to wage a difficult battle to overcome new rationalizations for the existence of inequality and increasing calls for separatism. In reviewing the three decades since the Kerner Commission Report and Dr. King's death, it is striking to realize that almost all of the major legislative and judicial initiatives that have sustained the effort for equal opportunity—the Supreme Court's decision in *Brown v. Board of Education*,[3] the Civil Rights Act of 1964,[4] the Head Start program,[5] the Elementary and Secondary Education Act of 1965,[6] and other elements of the War on Poverty—were in place before the events of 1968.

Several other important policy events occurred in the five years that followed. The Civil Rights Act of 1968 barred discriminatory practices in housing.[7] In the *Green*, *Swann*, and *Keyes* cases, the Supreme Court prescribed effective school desegregation remedies in the South and set forth rules against intentional segregation in the school districts of the North and West.[8] Further, the Court's unanimous decision in *Griggs v. Duke Power Co.* broadly interpreted fair employment law to bar unintentional job discrimination practices that harmed minorities and could not be justified by business necessity.[9]

Over the last two decades, the most notable positive developments have been the extensions of civil rights guarantees to members of other groups that have been victims of systemic discrimination, particularly women, Hispanic Americans, and people with disabilities;[10] and the legislative restoration of rights and remedies that had been limited by the restrictive interpretation of civil rights laws on the part of an increasingly conservative Supreme Court.[11] Only in rare instances did statutes or court decisions seek to remove barriers to equal opportunity faced by the minority poor.

In a sense, then, the drive for equality has been running on empty for a quarter of a century, sustained by laws and moral authority whose origins are remembered only dimly by millions of Americans. Although the officially sanctioned caste system that replaced slavery in the South and the sanction of racism throughout the nation are gone, racial animosity and fear still lie just beneath the surface and have erupted in recent years with frightening regularity—often with a far more devastating impact in the minority community than the counterpart events in the 1960s that gave rise to the Kerner Commission.[12]

More daunting still are the combination of race and poverty and the seemingly impersonal structures and institutions that deprive the minority poor of opportunities for advancement. When the Kerner Commission wrote its report in 1968, many cities were still great centers of employment and economic activity. Now, employment and economic wealth have shifted to suburbs, while the movement of middle-class citizens (including the minority middle class) out of cities has intensified.[13] The growing wealth of suburbs has brought superior education and other public services, often financed without great difficulty out of local property and income taxes. For the minority poor in cities, services have declined. Today, cities face a form of triage in seeking to meet a host of health, social, housing, and education needs.[14]

In the face of these difficulties, what is surprising is not that the movement for equality has faltered, but that it persists, and that people continue to move out of the shadows of deprivation and discrimination to lead productive lives. The longevity of the movement is a tribute to the power of the idea of equality embodied in the Fourteenth Amendment, and to a recognition during the 1960s that implementation required affirmative effort to undo the effects of past wrongs. The staying power of the movement is due also to the ability of so many minority citizens to use *Brown* and other decisions as a means of empowering themselves through education, employment, and political and community action, and to the fact that race continues to be the central dilemma of our society and to gnaw at the American psyche.

This chapter is premised on a belief that the relevant test for racial justice in contemporary America is how well we serve those who are worst off in our society. The chapter focuses almost exclusively on conditions affecting the life chances of people who live in *concentrated* poverty in our nation's cities. While poverty remains a problem that transcends color lines, those who live in concentrated poverty are almost exclusively African Americans and Hispanic Americans.[15] This situation did not come about accidentally. Discrimination on account of race and skin color has not only limited the economic opportunities of minorities but has kept them confined geographically to urban ghettos and barrios, usually densely populated, where they face barriers that are greater than those encountered by other poor people.

It is beyond the scope of this chapter to propose comprehensive policies for dealing with minority poverty. Rather, I will examine the utility of two longstanding national policies—desegregation and affirmative action—in providing opportunity for the minority poor. The thesis of the chapter is that the two policies, often reviled these days as out of fashion or as serving only the needs of the middle class, have in fact been mainstays of what little anti-poverty policy the nation has had over the past three decades.

Pursuit of desegregation and affirmative action has helped to create conditions in which many minority citizens have been able to lift themselves out of poverty and join the swelling ranks of the black and Latino middle class. Clearly, neither policy is sufficient as an anti-poverty strategy. But they remain *necessary* policies, and abandonment of either would leave the minority poor more bereft of hope than they already are.

I. Desegregation as an Anti-Poverty Strategy

When the Supreme Court in the 1954 *Brown* decision struck down the laws of southern and border states commanding racial segregation in public schools, the unanimous opinion stressed the social science evidence of harm to black children, stating that segregation affects the "hearts and minds [of children] in a way unlikely ever to be undone."[16]

There ensued a debate on whether the decision was grounded in equal protection jurisprudence (the right of black people to "exemption from unfriendly legislation against them distinctively as colored"[17]), or whether it was based not on law but on the shifting sands of social science evidence.

I count myself in the ranks of people who believe that the decision was solidly grounded in law, and that Chief Justice Warren stressed the social science evidence in an effort to persuade people that this far-reaching change in their lives had to be mandated because of the damage that was being done to little children.

But the interesting and perhaps surprising thing is that over more than four decades, the sands have not shifted and the social science evidence on the

Brown issues has remained remarkably consistent, and grown stronger.

In the 1964 Civil Rights Act, Congress mandated what became the largest education study ever conducted, an inquiry into the status of some 600,000 students in public schools. The resulting Coleman Report concluded that socio-economic isolation and racial isolation are harmful to minority students, and that the socio-economic composition of classrooms (along with teacher competence) is one of the most important variables in determining educational outcomes.[18]

In 1997, another large, congressionally mandated report was issued: an evaluation of the effectiveness of Title I of the Elementary and Secondary Education Act (the $7 billion program of federal aid to disadvantaged children). This study—the *Prospects* report conducted by Abt Associates—after examining the progress of thousands of students over several years, reached conclusions very similar to those of the Coleman Report.[19] Specifically, the report found that poor children attending schools that were 75% or more non-poor did far better on tests of reading ability than their counterparts who attended schools that were 75% or more poor in their student composition.[20]

Striking evidence of progress in the performance of black children over the years is found in the scores of 13- and 17-year-olds on reading tests conducted by the widely respected National Assessment of Educational Progress (NAEP).[21] According to one analysis, "[b]y conservative estimates [the scores] indicate a reduction in the gap between African Americans and White students over the past 20 years of roughly 50 percent when the students are 17 years old."[22] Another analysis of the NAEP data conducted by RAND researchers concluded that, while the gains made by white students from 1970 to 1990 were about as great as expected, the scores of black and Latino students increased by about *two-thirds more than predicted*.[23]

There is evidence that desegregation played an important role in this progress. Black elementary students in the Southeast recorded the greatest gains in reading on the NAEP assessments during the 1970s, with the gains taking place during the period when school desegregation was occurring all across the region for the first time.[24] This strong indication of a link between desegregation and academic achievement is reinforced by case studies of particular communities that desegregated during the 1970s. These studies reveal that, in many cases, where the desegregation process was begun early in a child's career, the scores of minority students increased, in some cases modestly, and in others significantly.[25]

The benefits to poor minority children flowing from desegregation are not simply a matter of better achievement scores. Other studies show that, in the long term, black students attending desegregated schools are more likely to complete high school, to enroll in and graduate from four-year desegregated colleges, and to major in subjects that lead to more remunerative jobs and professions.[26]

From my own experience in representing a class of black children in school litigation in St. Louis, I can testify about the positive results stemming from desegregation. In 1983, a settlement was reached in that case that resulted in the largest voluntary metropolitan school desegregation program in the nation—with some 13,000 black youngsters from the city enrolled in 16 predominantly white school systems in the suburbs. Three out of every four transfer students are poor; yet they complete high school at about twice the rate of their counterparts in racially isolated city schools and attend college at a rate that is three times the national average for black high school graduates.[27]

The reasons for these striking contrasts are not difficult to discern and have nothing to do with the canard that desegregation advocates hold the patronizing opinion that there is some magic for black children in sitting next to white children. First of all, in schools dominated by a middle-class or affluent population, parents are practiced in holding the school accountable for results—in assuring that the curriculum and resources are up-to-date and adequate and in securing the replacement of principals and teachers who are not performing adequately. Low-income schools also have concerned parents, but they generally lack the clout to bring about change.

Second, the hallmark of more affluent schools is high expectations for all students, a creed that is spread by principals, teachers, and parents and that is internalized by students.[28] High schools, as D.W. Brogan once observed, are places where "students instruct each other how to live in America."[29] Once, in hearings held by the U.S. Commission on Civil Rights in the 1960s, we asked a black high school student to describe the differences between her old inner city school and the more affluent, desegregated school to which she had transferred. "In my old school," she replied, "a student might ask another whether she planned to go to college; in my new school they ask 'which college are you going to?'"

Nor is peer influence restricted to the matter of high expectations. Minority and low-income students gain access not only to better counseling, but to a host of informal lessons in how to get ahead in American society.

None of this is intended to suggest that substantial educational improvement cannot take place in racially and socio-economically isolated schools. In every big city in the nation there are a handful of such schools that are producing results—usually through a combination of strong educational leadership, high standards and expectations, capable and dedicated teachers, and the development of school-parental ties. But these success stories have proven to be difficult to replicate, especially in an era when the once captive pool of talented women and minority teachers has other opportunities, and inner-city schools have difficulty in attracting and retaining capable teachers.

The virtue of the St. Louis metropolitan initiative and other desegregation programs is that students who are minority and poor become participants in systems that are already successful in producing positive educational outcomes. While care must be taken that the minority students are treated equitably and derive the maximum benefit from their learning environments, that effort is less challenging than trying to rebuild an unsuccessful system from the ground up.

Indeed, the danger now is that a conservative Supreme Court will draw the curtain on the *Brown* era and sanction a return to more segregated schools and a racially divided society. In the 1990s, for the first time, the overall trend is toward resegregation[30] and, coincidentally or not, the gap between the performance of minority and white students, which had been narrowing for two decades, has begun to widen again.[31]

President Clinton said in September 1997, on the occasion of the 40th anniversary of the entry of black students into Central High School in Little Rock, that "the alternative to integration is . . . disintegration."[32] He was speaking of the tendency of racial isolation to breed fear, mistrust, and division. It is equally clear that a return to segregation will cut off avenues of opportunity that have provided mobility for the minority poor. It will take acts of strong and courageous leadership to avert these results.

II. Affirmative Action as a Mobility Strategy

Affirmative action is a policy that was born in the 1960s and that has evolved since to meet the practical need of applying civil rights law in ways that provide real opportunity for people who have been denied it in the past. Affirmative action first appeared as a federal policy in President Kennedy's Executive Order prohibiting discrimination by government contractors. The policy was initially applied to require corporations that employed few minority workers to engage in affirmative outreach (e.g., advertising in minority media, recruiting at black colleges) in an effort to stimulate more applications.

After several years, there were few gains to report: institutional inertia was strong in many industries and hiring through the grapevine using current employees (almost all white) worked against change. Moreover, in some areas like the construction trades, the preferences of dominant white groups for "their own kind" were so deeply entrenched as to resist applications of affirmative action that were merely hortatory.

In response, the Administrations of Lyndon Johnson and then Richard Nixon developed the concept of goals and timetables. The notion was to apply techniques that were familiar to the business world to achieve civil rights objectives. The goals were not rigid and employers were not called upon to hire unqualified applicants but, by adopting a results-oriented approach, it was hoped that real progress could be made.

In fact, these hopes were not disappointed. Goals and timetables became the basis of broad consent agreements that the government entered into in the 1970s with AT&T and with the steel industry, both to end discrimination and to establish processes for the future hiring and promotion of minorities and women.[33] Affirmative action also tempered the increasing tendency of employers to apply mechanically the results of tests (most of them later invalidated) to select employees.

Contrary to the claims of critics, affirmative action policies have not been designed or implemented primarily to benefit middle-class people. In fact, many of the most striking gains have occurred in occupations and trades not usually associated with advantaged status—occupations such as law enforcement, firefighting, trucking, and skilled construction work. In law enforcement, for example, the number of black police officers nearly doubled from 1970 to 1980 as a result of affirmative action litigation and enforcement efforts. In Philadelphia, after the initiation of goals and timetables for federal contractors, the percentage of skilled minority construction workers rose from less than 1% to more than 12% of the total.[34]

Affirmative action policies in higher education have evolved in ways similar to their development in the employment field. Just as affirmative action in employment is applied mainly at the entry level, affirmative action in higher education is applied at the admission stage. Once applicants pass the gateways, they must succeed by dint of their own efforts. Affirmative action does not guarantee success, but only an opportunity to compete.

As in employment, critics have charged that the beneficiaries of affirmative action in higher education are already advantaged. This view is contradicted by studies showing that of the increased enrollment of minorities in medical schools in the 1970s, significant numbers were from families of low income and job status.[35]

Perhaps the most encouraging story to come out of the civil rights revolution is the emergence of a large, strong black middle class, not totally freed from the wounds of racism, but able to participate more fully in American society. Surprisingly little scholarly attention has been give to the dynamics of this change—how victories won in the courts and Congress were translated into tangible opportunities for people to make changes in their own lives. But clues emerge from some of the research that has been done. The RAND study, discussed above,[36] explored the potential explanations for the major gains made by black teenagers in reading proficiency, gains that cut the gap with whites almost in half. Among the factors contributing to these gains, according to the RAND study, is the fact that the number of black parents with college degrees or experience *quadrupled* during the two decades, reaching 25% in the 1990s.[37]

What accounts for this tremendous change? Certainly, as noted, the opportunities for a better education at the K-12 level provided through desegregation were one factor. Surely, too, the affirmative action policies adopted by many colleges and universities provided opportunities to students of color who had been denied opportunities in the past. Many took full advantage of these opportunities, worked hard, got their degrees, found better and more remunerative jobs than their predecessors, married, and formed stable families. All of this created an environment in which their children could achieve, as reflected on the NAEP assessments.

The positive dynamic, while receiving little attention, is a counter to the well-publicized negative cycle of unemployment, poor education, and social pathology. Yet the attack on affirmative action in the courts and by political leaders threatens one of the key elements that has helped to produce progress. Affirmative action is no substitute for other policies designed to produce jobs and education, to rebuild communities, and to strengthen families. But in a nation that has not demonstrated a readiness to make the investments needed to effectuate these other policies, it would be folly to discard affirmative action, a policy that had made practical contributions toward achieving the same goal.

When efforts to eliminate affirmative action in California and Texas result in a dramatic drop in the enrollment of students of color in undergraduate and professional programs at colleges and universities, it ought to send a shudder through all of us. Unless countered, the ultimate result will be a halt in the progress of the last three decades and a swelling of the ranks of those who, lacking opportunity, sink into poverty and dependency.

III. Conclusion

America today is in many ways afflicted by the same racial schizophrenia that prevailed when the Kerner Commission Report was published thirty years ago.

Advertising images of racial harmony dot our television screens while *The Bell Curve*[38] and other books explicitly or implicitly endorsing theories of white supremacy litter our bookstores. In many ways, the undeniable progress that has been made hinders efforts to extirpate the substantial vestiges of racism that remain. So, middle-class white Americans may feel that their acceptance of people of color who are most like them affords permission to reject and even demonize others who appear to be different. Stereotypes that in the past have been used to impugn the character, intelligence, industry, and morals of people of color have been replaced by almost identical stereotypes applied to poor people. While open racial stereotyping is no longer acceptable, bashing the poor occurs without restraint on the floor of Congress and in other public places.

The schizophrenia is reflected in public policymaking as well. In 1994, the Congress adopted bold education reform legislation premised on the finding that "[r]esearch clearly shows that children, including low-achieving children, can succeed when expectations are high and all children are given the opportunity to learn challenging material."[39] At the very same time, lawyers for the State of Missouri and other states that had until recently deliberately segregated their schools were arguing that public schools could not be expected to close the gap between white and black students because of the poverty of the latter. Demography is destiny, they argued in effect, and it was not reasonable to ask public schools to continue to perform their historic role of helping poor people to become educated enough to lift themselves out of poverty.

There is comfort to be found in the fact that in endorsing desegregation and affirmative action and in launching his Race Initiative, President Clinton is embracing the values and legacy of Martin Luther King, Jr., Thurgood Marshall, Earl Warren, and Lyndon Johnson. But in the 1960s, oratory was accompanied by policy and action, and there is cause for concern about whether that will occur today.

While the days of major school desegregation litigation in the federal courts may be ending, there is every reason to embrace in public policymaking the successful experience that desegregation has brought in other forums. For example, federal education law now identifies as a potential remedy for failing schools an option for students trapped in those schools to transfer to schools that are succeeding either in their own districts or in the region. Such an option, while not framed as a desegregation remedy, would enable the successful metropolitan desegregation program in St. Louis to be replicated elsewhere. But for the remedy to become a reality, national leadership is needed and states would have to establish the mechanisms, including transportation assistance, to make the programs accessible to poor families.[40]

Similarly, the future of federal and state affirmative action policies now hangs in the balance, its fate ultimately to be determined by a closely divided Supreme Court. For years, under the guiding hand of Justice Brennan, the Court took a measured approach, weighing the need to redress past discrimination against the settled interests of incumbent white workers. Under the Rehnquist Court, the scales have shifted and challenged affirmative action policies are now required to meet a heavy burden of justification.

Critics of affirmative action say facilely that using race as a factor could be replaced by the use of socio-economic status. But such a change would render affirmative action more difficult to administer and less effective in providing opportunities to those who need them. Rather, the leaders of universities should be thinking hard these days about the undue weight given to standardized tests as the primary factor in the admissions process. They should be thinking too about articulating with clarity the mission of universities and specifically address such questions as whether there is a place for students whose ability to excel in one or two areas is not reflected in general tests of aptitude or ability. Government officials, too, should be thinking about whether tests that disproportionately screen out minority applicants can be justified as educationally necessary—a standard required by the civil rights laws.

Today, the measuring rod for racial justice and equality, and for averting the Kerner Report fear of two societies, separate and unequal, is the one offered by President Franklin Roosevelt during the Depression: "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."[41] In the civil rights policies of the last three decades we have the foundation for meeting that test. The question is whether the nation will build on those policies or discard them.

Endnotes

[1] This chapter is a slightly revised version of a chapter appearing in Fred R. Harris and Lynn A. Curtis, eds., *Locked in the Poorhouse: Cities, Race, and Poverty in the United States* (Lanham, MD: Rowman & Littlefield 1998). It appears here with the permission of Rowman & Littlefield.

[2] *Report of the National Advisory Commission on Civil Disorders* (Washington, D.C.: U.S. Government Printing Office 1968).

[3] 347 U.S. 483 (1954).

[4] Public Law No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975, 2000).

[5] The Head Start program was created under the Economic Opportunity Act of 1964, Public Law No. 88-452, 78 Stat. 508. It was reauthorized under the Head Start Act of 1981, Public Law No. 97-35, 96 Stat. 499, and was amended by the Human Services Amendments of 1994, Public Law No. 103-252, 108 Stat. 623 (codified as amended in scattered sections of 20 and 42 U.S.C.).

[6] Public Law No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.). The act was reauthorized by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Public Law No. 100-297, 102 Stat. 130, and by the Improving America's Schools Act of 1994, Public Law No. 103-382, 108 Stat. 3518.

[7] Civil Rights Act of 1968, Title VIII, § 812, Public Law No. 90-284, 82 Stat. 73, 88 (codified as amended at 42 U.S.C. § 3612).

[8] *Green v. County School Board of New Kent County*, 391 U.S. 430, 438 (1968) (holding that a school board has an affirmative duty to eliminate a dual system "root and branch"); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28-29 (1971) (holding that a district court has broad discretion to administer remedies, including systemwide desegregation through the use of busing); *Keyes v. School District No. 1*, 413 U.S. 189, 207 (1973) (holding that intentionally segregative conduct by a school board in a "meaningful portion" of a school system would require a systemwide remedy).

[9] *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-33 (1971).

[10] See, for example, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (prohibiting discrimination on the basis of gender in educational programs receiving federal assistance); Americans with Disabilities Act of 1990, Public Law No. 101-36, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C. and 29 U.S.C. § 706) (providing equal access to persons with disabilities in the areas of employment, public accommodations, and transportation); *Lau v. Nichols*, 414 U.S. 563, 564 (1974) (holding that non-English-speaking students are entitled to equal educational opportunity under 42 U.SC. § 2000d); *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1087 (1992) (holding that Title IX remedies include monetary damages).

[11] See Voting Rights Act Amendments of 1982, Public Law No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973) (reversing *City of Mobile v. Bolden*, 446 U.S. 55 (1980)); Civil Rights Restoration Act of 1988, Public Law No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681, 1687, 1688; 29 U.S.C.A. §§ 4, 706; 42 U.S.C. §§ 2000-4, 6107) (reversing *Grove City College v. Bell*, 465 U.S. 555, 570-75); Civil Rights Act of 1991, Public Law No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.) (reversing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-58 (1989) and other Supreme Court decisions in 1989).

[12] See, e.g., Bill McAllister, "Call for a Panel on L.A. Unrest Echoes Historical Response," *The Washington Post*, May 4, 1992; Carla Rivera, "Riots' Causes Same as in '60s, State Panel Says," *Los Angeles Times*, Oct. 2, 1992.

[13] See, for example, John F. Kain, "Housing Segregation, Negro Employment, and Metropolitan Decentralization," 82 *Quarterly Journal of Economics* 175 (1968) (addressing the link between discrimination and segregation in metropolitan housing markets and the distribution and level of minority employment); John F. Kain, "The Spatial Mismatch Hypothesis: Three Decades Later," 3 *Housing Policy Debate* 371 (1992) (reviewing research regarding the impact of housing discrimination on black employment); John D. Kasarda, "Urban Industrial Transition and the Underclass," 501 *Annals of the American Academy of Political and Social Science* 26 (1989) (noting the transformation of cities from "centers of production and distribution of goods to centers of administration, finance and information exchange," and a resulting loss in available blue-collar employment).

[14] See, for example, *Abbott v. Burke*, 199 N.J. 287, 355-57, 575 A.2d 359, 393-94 (1990) (discussing the relationship between "municipal overburden" and substandard education in urban areas).

[15] Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, at 129-30 (Cambridge, MA: Harvard University Press 1993). Massey and Denton construct an index of concentrated poverty based on the percentage of poor families in the neighborhood of the average poor family. They then compare the percentage poor in the neighborhood of the average poor black family with a like percentage for the average white family. *Id.*

[16] *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

[17] *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880).

[18] James S. Coleman, Ernest Q. Campbell, Carol J. Hobson, James McPartland, Alexander M. Mood, Frederic D. Weinfeld, and Robert L. York, *Equality of Educational Opportunity* (Washington, D.C.: U.S. Government Printing Office 1966) (the "Coleman Report"). See also U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (Washington, D.C.: U.S. Government Printing Office 1967).

[19] Abt Associates, *Prospects: The Congressionally Mandated Study of Educational Growth and Opportunity* (Washington, D.C.: U.S. Department of Education 1993).

[20] *Id.* Thirty percent of poor children in high-poverty schools scored in the lowest tenth percentile, three times the percentage of those in low-poverty schools. In contrast, 30% of poor children in low-poverty school scored in the top half, compared with only 16% of those in high-poverty schools. *Id.*

[21] National Assessment of Educational Progress (NAEP), *Three Assessments of Progress in Reading Performance, 1970-1980* (Denver: Education Commission of the States 1981).

[22] Marshall Smith and Jennifer O'Day, "Educational Equality: 1966 and Now," *in* Deborah A. Verstegen and James G. Ward, eds., *Spheres of Justice in Education: The 1990 American Education Finance Association Yearbook*, at 75 (New York: Harper Business 1991).

[23] David W. Grissmer, Sheila Natarj Kirby, Mark Berends, and Stephanie Williamson, *Student Achievement and the Changing American Family: An Executive Summary*, at 22 (Santa Monica, CA: RAND 1994) (hereinafter the "RAND study").

[24] NAEP, *supra* note 21. Other factors may have been the increased investments in public education in the South after enactment of Title I of the Elementary and Secondary Education Act, and the availability of more early childhood education opportunities for poor children after passage of Head Start.

[25] Robert L. Crain and Rita E. Marhard, "Minority Achievement: Policy Implications of Research," *in* Willis D. Hawley, ed., *Effective School Desegregation: Equity, Quality, and Feasibility*, at 55-84 (Beverly Hills, CA: Sage 1981).

[26] James McPartland and JoMills Braddock, "Going to College and Getting a Good Job: The Impact of Desegregation," *in Effective School Desegregation*, *supra* note 25. In addition, low-income black students who receive a desegregated education have a good chance to avoid situations and behavior (such as teenage pregnancy and hostile encounters with police) that blight the prospects of many of their peers. These findings emerge from a long-term study of some 700 low-income students in Hartford, Connecticut, one group of which began

desegregation in the 1960s while the other remained in segregated schools. See "Study Finds Desegregation Is an Effective Social Tool," *The New York Times*, Sep. 17, 1985. See also Robert L. Crain and Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (Baltimore: John Hopkins University, Center for Social Organization of Schools 1985) (analyzing the impact of the Hartford desegregation program on occupational outcomes).

[27] Amy Stuart Wells and Robert L. Crain, *Stepping Over the Color Line: African-American Students in White Suburban Schools*, at 197-99 (New Haven, CT: Yale University Press 1997).

[28] High expectations are not extended automatically to minority and low-income students who transfer in. Educational leadership is needed to ensure that these students do not become victims of a dual standard.

[29] Dennis W. Brogan, *The American Character*, at 170, 174-75 (New York: Time 1956).

[30] Gary Orfield and Sean Reardon, "Race, Poverty, and Inequality," *in* Citizens' Commission on Civil Rights, *New Opportunities: Civil Rights at a Crossroads* (Washington D.C.: Citizens' Commission on Civil Rights 1992).

[31] Education Watch: *The 1996 Education Trust State and National Data Book*, at 5 (Washington, D.C.: The Education Trust 1996).

[32] White House Press Release, *Remarks by the President in Ceremony Commemorating the 40th Anniversary of the Desegregation of Central High School* (White House: Office of the Press Secretary Sep. 25, 1997).

[33] See *ICCM Employment Practice Guide*, at 1860 (1973); U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort-1974*, at 552-53 (Washington, D.C.: U.S. Government Printing Office 1975).

[34] One critic of this point has argued that the initiatives I cite are dated, going back to the 1970s and 1980s. Richard D. Kahlenberg, *The Remedy: Class, Race and Affirmative Action* (Basic Books 1996). He fails to note that the continued presence of minorities in these fields into the 1990s indicates that affirmation action is continuing to provide opportunity and mobility. Nor does he deal with the precipitous drop in minority enrollments at higher education institutions that have been forced by court orders to eliminate their affirmative action policies, an omen of what may happen in both higher education and employment if affirmative action is ended.

[35] See Marcus Alexis, "The Effect of Admission Procedures on Minority Enrollment in Graduate and Professional Schools," *in Working Papers: Bakke, Weber and Affirmative Action*, at 52-71 (New York: Rockerfeller Foundation 1979).

[36] RAND study, *supra* note 23, and accompanying text.

[37] *Id.*

[38] Richard J. Herrnstein, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press 1994).

[39] Title I of the Improving America's Schools Act, Public Law No. 103-382, 108 Stat. 3518 (1994) (codified at 20 U.S.C. §§ 6301-6514).

[40] There is also room for enlightened judicial action at the state level. In *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996), the Connecticut Supreme Court recently found that the equal protection provisions of the state constitution required a remedy for poor children of color in the isolated schools of the inner city.

[41] Franklin Delano Roosevelt, Second Inaugural Address, January 20, 1937, *in* Davis Newton Lott, ed., *The Inaugural Addresses of the American Presidents from Washington to Kennedy*, at 239-40 (New York: Holt, Rinehart and Winston 1961).

Chapter V

Underlying Civil Rights "Infrastructure" Issues

by Gary D. Bass, Patrick Lemmon, and Reece Rushing[1]

Introduction

This chapter addresses a range of cross-cutting "infrastructure" issues that affect nearly all civil rights programs and organizations involved in civil rights issues. Specifically, we address regulatory "reform" issues, attempts to silence the advocacy voice of charitable organizations, efforts to improve access to government information, and the outlook for the FY2000 budget.

While many of these issues affect a large cross section of the public interest community, the civil rights community in particular has a major stake. Nearly every key decision in government affects the civil rights community, whether it be a regulatory or funding issue. When the government decides to withhold information, making only select items available, or making information available in a less than useful format, it affects our ability to carry out our missions and has major implications for the people we serve. And when Congress tries to undermine our ability to speak out on public policy matters, it is a shot across the bow for all civil rights.

These cross-cutting "infrastructure" issues are often viewed as boring or unrelated to the immediate civil rights struggle or issue at hand. But ultimately, every one of these issues plays a role in whatever that immediate struggle or issue is. Accordingly, our goal for this chapter is two-fold: to strengthen the engagement of the civil rights community in these issues; and to warn the Clinton Administration that these issues have widespread impact on basic civil rights.

I. Regulatory "Reform"

A. Background

During the past two years, federal agencies that oversee civil rights programs once again found themselves the targets of congressional conservatives, but this time around, the legislation and the rhetoric were decidedly toned down.

There was nothing in the 105th Congress, for instance, resembling the flagrant (and fortunately, unsuccessful) attempts by House Speaker Newt Gingrich (R-GA)[2] and former Senate Majority Leader Bob Dole (R-KS)[3] in the 104th Congress to dismantle public protections in one giant swoop. Instead, the House pushed a series of smaller bills, while in the Senate, Senator Fred Thompson (R-TN), who was joined by Senator Carl Levin (D-MI), one of the leading opponents to the Dole bill, tried a bipartisan approach to comprehensive "reform." In the end, for a number of reasons, none of these bills were enacted; yet all are likely to resurface again in the 106th Congress.

The only victories for conservatives came in the form of several appropriations riders that were not the subject of a single hearing or mark-up, and would have been difficult to pass on their own merits. One requires the Office of Management and Budget (OMB) to conduct a burdensome report—known as a "regulatory accounting"—on the cumulative costs and benefits of the entire regulatory system, as well as of every program activity. The other requires agencies to conduct an impossible and ridiculous analysis on the impact of each major regulation on families (defined in the most traditional sense). Each could be problematic for the civil rights community.

The current rulemaking process is a cumbersome maze of hoops and hurdles that makes it extremely difficult for our government to deliver vital protections to its citizens. For instance, it takes the Occupational Safety and Health Administration (OSHA) an average of ten years to issue major rules, and most other agencies are not much better. Yet Congress seems to be in a state of denial. Not only has Congress made no effort to streamline bureaucratic requirements, it has actually been busy erecting new ones.

A number of burdensome requirements were enacted during the 104th Congress, including several laws that grant special advantages to small businesses[4] and state governments[5] in the rulemaking process and have the potential to allow for less protective standards. But the civil rights community fought for and won certain protections. For example, nearly all these laws carry exemptions for laws against discrimination.

The 105th Congress picked up right where the 104th Congress left off, but had less success in passing laws. Notably, however, the bills considered did not carry similar civil rights exemptions.

The premise behind all this regulatory "reform" legislation is that out-of-control agencies are heaping senseless regulations on an overburdened business sector. But when you consider that OSHA has promulgated just two major regulations in the last five years and that the Environmental Protection Agency (EPA) only updated its clean air standards after a court order (and years after the deadline required by the Clean Air Act), that premise is revealed as a dangerous fallacy perpetuated by a powerful business lobby with an endless amount of resources. The tide began to shift in the 105th Congress only insofar as conservatives were not as bold. But the underlying premise, even for responsible senators like Senator Levin, remains well off the mark. Legislation based on this premise will undoubtedly produce an even more lopsided rulemaking process with severe consequences for public health, safety, and the environment.

Basic civil rights are at great risk in this environment. One consistent theme of all regulatory "reform" legislation is its emphasis on the monetization of costs and benefits. Yet many benefits are virtually impossible to monetize—and putting a price tag on civil rights seems especially absurd. But that is exactly what many of these bills require, which inevitably leads to the undervaluing of the things Americans care about most.

Is it really appropriate to place a dollar value on the benefits of the Americans with Disabilities Act? And if so, how should this be done? A regulatory environment that relegates important public policy decisions to economic factors can be very dangerous.

B. Thompson/Levin Regulatory "Reform"

Aside from the two anti-regulatory riders, agencies emerged from the 105th Congress largely unscathed despite repeated attacks on public protections.

Most notably, the vehicle for comprehensive regulatory "reform," The Regulatory Improvement Act (S. 981), was never brought to the Senate floor for a vote. This was due to the efforts of the public interest community in rallying opposition from the Clinton Administration and key Senate Democrats, despite the fact that one of their most respected members (Senator Levin) was a chief sponsor. This opposition forced Senator Levin to seek a compromise with the Administration, which resulted in the removal of several of the most objectionable provisions of the legislation, including two so-called "look-back" provisions requiring the re-examination of regulations already on the books. Despite the important changes that resulted from the deal with the Administration, the Thompson/Levin bill retained its basic framework and did little to alleviate concerns about red tape, slanted analysis, and increased litigation. The Administration therefore should have held firm in opposition.

The public interest community remained opposed to the bill on the grounds that it would still delay the rulemaking process and inappropriately elevate cost considerations over benefits. On the other side, Senate Majority Leader Trent Lott (R-MS) and many in the business community seemed to believe that the bill did not go far enough—especially with the changes made at the request of the Administration—and Senator Lott never made time for a floor vote.

With Senator John Glenn's (D-OH) launch into space and subsequent retirement from the Senate, Senator Levin lost one of his key allies for regulatory "reform," but he was still able to build some momentum after the deal with the Administration, racking up new Democratic co-sponsors, including Senate Minority Leader Tom Daschle (D-SD). After coming so close, Senator Levin is unlikely to give up when the next Congress begins in January 1999.

Some of the more problematic features of the bill include the following:

1. Risk Assessments

Risk assessments are conducted to measure the level of risk associated with a given health hazard. For example, in promulgating its new clean air standards, EPA used a risk assessment to determine that there are more than 15,000 premature deaths each year due to current levels of air pollution. For regulations that do not entail health risks, such as those dealing with civil rights or community right-to-know, agencies, for obvious reasons, are not required to undertake risk assessments. But that would change under the broad, all-encompassing approach of the Thompson/Levin bill. This surely is a mistake. With the many varied obligations of federal agencies, risk assessment should be dealt with on a statute-by-statute basis where it can be appropriately tailored to the given program area. As the Administration pointed out in a letter to Senator Levin, "one of the problems with comprehensive legislation is that so many different kinds of rulemakings are affected."[6]

2. Peer Review

The all-encompassing approach does not work for "peer review" either. For example, the Occupational Safety and Health Act already requires OSHA to hold a public hearing—with the opportunity to present testimony and examine witnesses—as part of its major rulemakings. This process provides for a full review of the proposed rule and any associated risk assessment or cost-benefit analysis. Requiring OSHA to hold a separate peer review proceeding runs counter to the Administration's statement prior to its deal with Senator Thompson and Senator Levin that it would oppose "creating unwarranted . . . or needless burdens on agencies acting to protect human health [and] safety."[7]

Whether or not a broad "peer review" requirement is prudent, it is clear that the process set up by S. 981 is deeply flawed. Most troubling, the bill does not bar those with conflicts of interest from serving on peer review panels, potentially giving self-interested parties another bite at the apple. This fox-in-the-hen-house approach makes little sense, especially considering that those with an interest in the outcome of a regulation already have extensive opportunity to participate in the rulemaking process, and do so vigorously. Ironically, while the Thompson/Levin bill would allow conflict of interest participation, it would bar agency experts from participating.

3. OMB Reviews

The bill codifies authority for OMB to review agency rules, which it has exercised ever since President Reagan issued Executive Order 12291 in 1981. Over that period of time, but most particularly in the years before the Clinton Administration, OMB would delay its review if it did not support a particular rule. This delay tactic received national attention during the operation of the Quayle Council on Competitiveness. The Thompson/Levin bill would give OMB 90 days to review a rule, but would allow unlimited extensions on this deadline. In effect, it creates an unacceptable opportunity for renewal of the delay tactics exercised in the 1980s.

4. Sunshine at OMB

Current disclosure requirements at OMB are inadequate. The public is unable to trace activities related to a particular rule, identify specific substantive concerns raised by OMB, or adequately search through the regulatory materials posted by OMB to the World Wide Web. But the modified bill actually lowers the bar. Initially, the Thompson/Levin bill contained requirements that OMB must disclose to the public and the agency "a written explanation of any review action and the date of such action." But this requirement was deleted at the request of the Administration.

Furthermore, for any "substantive" meeting or telephone call between OMB and individuals outside government, the original Thompson/Levin language required a list with the date, names of participants, and subject matter. The intent of the word "substantive" was to limit the logging of meetings and calls to discussions that involve the actual substance of a rule. At the request of the Administration, however, this standard was altered to require only the logging of "significant" meetings and telephone calls. There is no definition of "significant," thus allowing OMB to make those determinations. This would give OMB an opportunity to avoid openness and accountability, putting us right back to where we were in the 1980s.

5. Cost Estimates that Mislead

The regulated community has long wanted to include indirect expenditures to drive up projected costs and discourage regulation. The Thompson/Levin bill would require agencies to assess "indirect" costs as part of each rulemaking, but does not define the term. The bill also sets forth a number of skewed tests dealing with "net benefits" and "cost effectiveness" that seem to emphasize monetization, which would likely lead to the understating of benefits. The truth is that agencies already inflate cost estimates for a number of reasons: for instance, agencies do not predict newer technologies that are developed as a result of a regulation. Yet the Thompson/Levin bill includes no instructions on how to handle such issues. As a result, cost-benefit analyses will be skewed in a manner to suggest less public protection.

The Clinton Administration receives both high and low marks on this bill. On the negative side, the bill was perceived as all but dead until Vice President Gore breathed life into it by entering into negotiations with Senator Levin and Senator Thompson. On the positive side, the Administration negotiated vast improvements in the bill. However, the problems described above still remain even after the Administration's negotiations. Moreover, the Administration sought changes that allow OMB to have more power than it currently has and to operate in greater secrecy than current practice. For civil rights groups working on issues such as immigration and welfare, these changes make it that much more difficult to fight for fair regulations.

C. Regulatory Accounting

A version of the regulatory accounting requirement mandating a cumulative cost-benefit analysis by OMB has actually been in place for the past two years (with OMB finding substantially greater benefits than costs). In both of its reports, OMB has stated that such aggregation is impossible, unreliable, and carries no use for policymaking.[8] But instead of heeding OMB and scrapping the requirement, Senator Fred Thompson (R-TN) has decided to go in exactly the opposite direction.

Senator Thompson's regulatory accounting amendment is much more burdensome and wasteful, calling for a host of sub-analyses by, among other things, agency and agency program, as well as other paperwork requirements.

The most troubling aspect of the rider requires OMB to develop standardized measures for costs and benefits. One of the main points of contention surrounding earlier regulatory "reform" bills has been around the idea that there should be some uniform, universal cost-benefit criteria. But this ignores the reality that agencies have many diverse functions and often need to tailor their approaches to the different types of concerns they address.

Moreover, OMB's standardized measures must be subjected to a peer review process that is exempt from sunshine or public disclosure laws. In fact, the public will never have an opportunity to comment on the standardized measures. Agencies that choose not to use OMB's standardized measures (or are limited in their ability to do so by statutory requirements) will likely be forced into doing two estimates—one for the development of the rule and the other for the development of the regulatory accounting report.

As called for by the regulatory accounting requirement, OMB issued a draft report on August 17, 1998, that found substantially greater benefits than costs—$258 billion to $3.55 trillion in annual benefits and $170 billion to $224 billion in annual costs—which were expressed in ranges to underscore the uncertainty of such estimates. These figures were clearly not what conservatives are looking for.

It probably shouldn't be surprising then that Senator Thompson's provision seeks to forcibly move the numbers in his ideological direction by heavily emphasizing cost considerations and excluding sub-analyses of benefits, such as the effect of regulation on children. This is an obvious attempt to construct a rhetorical tool to artificially bolster the case for comprehensive regulatory "reform." There is no substance to it at all. OMB states in its August 17 draft report: "Aggregate estimates of the costs and benefits offer little guidance on how to improve the efficiency, effectiveness, or soundness of the existing body of regulations."[9] Yet Senator Thompson recently said he plans to make sure his rider is enacted as freestanding legislation in the next Congress, which would make it a permanent feature of the federal regulatory apparatus.

D. Family Impact Analysis

The other anti-regulatory appropriations rider requires agencies to analyze the impact of each major rule on families. This appears to be more of a symbolic gesture, but nonetheless could prove troublesome. It is actually based on a Reagan Executive Order[10] that was recently repealed by President Clinton and replaced with a new requirement that agencies give special consideration to children's health in developing standards.[11]

Because it has little substantive value, the family Executive Order was completely ignored by federal agencies and even President Reagan's own OMB. Having learned nothing from this, the congressional leadership managed to keep it on the appropriations bill over the objections of the Clinton Administration, leaving agencies to deal with it once again.

For proposed policies and regulations that may affect family well-being, the provision requires, among other things, that each agency assess how the action "strengthens or erodes the authority and rights of parents in education, nurture, and supervision of their children," and its effect on the stability of the family, "particularly, the marital commitment."

While actually measuring such unmeasurables as the degree of parental authority and marital commitment is plainly impossible, even if you could do it, little would be revealed about whether an agency should regulate or not, because so many people would be excluded. If you were single, or a widow whose children have moved out, or a family that has not taken formal marriage vows, or even a child being raised in a group home, you could not be factored into the analysis. In order to count, you would have to be currently living as part of a family unit as defined by the provision.

It is important to note, too, that a law carries greater weight than an executive order. A largely symbolic and unenforced executive order is still not good, but give it the force of law, and it becomes a whole lot worse. That is what this provision does. Mandating such an analysis is the equivalent of mandating that agencies waste time and resources.

Even more troubling is a clause that allows any member of Congress to request an agency to conduct the family impact statement for any particular program.

Still, in the end, this provision may not have much of an impact. In most cases, we hope agencies determine that it doesn't apply. Where they determine it does, we hope they simply make brief statements of policy, instead of undertaking a full-fledged analysis that would only be a waste of resources.

E. The House's Piecemeal Approach

As stated earlier, the House took a more piecemeal approach to regulatory "reform" during the 105th

Congress, and actually succeeded in passing several onerous bills, all of which were strongly opposed by the Clinton Administration. While fortunately none were taken up on the Senate floor, they will undoubtedly resurface again in the next Congress and pose a real threat. Below is a summary of the pieces that received the most attention from Congress.

1. The Small Business Paperwork Reduction Act

Although this legislation (H.R. 3310), which passed the House in April 1998, was billed as a way to reduce paperwork burden, it actually has nothing to do with paperwork at all.

The most disturbing aspect of H.R. 3310 is its waiver of civil fines for any small business that is a first-time violator of a paperwork requirement (with a six-month window of immunity in which to comply). Currently, when small businesses make a good-faith effort to correct mistakes, agencies almost always waive fines for first-time violators anyway, which makes sense. But under H.R. 3310, federal agencies would not have the flexibility to take steps against willful violators. And in fact, the bill could encourage more violations since small businesses would know they could avoid reporting requirements—without fear of fine—until they are caught for the first time.

This is very significant because paperwork is the basis for enforcing public protections. For example, when a worker safety protection is issued, businesses often need to report on compliance or post information to workers on issues like equal employment practices. This "collection of information" is what serves as the means for monitoring the implementation of safeguards. Under H.R 3310, however, small businesses would be given an opportunity to violate standards without fear of penalty..

The effects could be far-reaching. During a hearing on the matter, the Justice Department testified that this would severely impair drug enforcement. In the case of a chemical standard, it could mean more workers die. In the case of meat inspection, we would risk bacterial contamination. In the case of health devices, consumers would not be assured of safety. Under any type of census, such as accident and injury reporting, a six-month delay would greatly upset data analysis and public understanding of compliance with laws and regulations.

H.R. 3310 also calls for a new small business advocate in each agency who would have the authority to review all paperwork. But there is already a Chief Information Officer in every agency to oversee paperwork, as mandated by the Paperwork Reduction Act. A new official, specifically geared to small business, would be redundant, as well as unfair. Why should small businesses have such a special liaison when no other interest is granted this privileged status?

A recent dispute involving EPA demonstrates how this requirement could skew the paperwork collection process. When EPA moved to expand the Toxics Right-to-Know program by requiring more industries to report, the small business community opposed this effort and used the Small Business Administration's Office of Advocacy as an effective weapon to nearly stop EPA. The dispute ultimately required action by Vice President Gore before EPA was permitted to proceed. With a small business advocate in every agency, delays like this could become commonplace—all because of one interest group with a disproportionate amount of leverage.

The goal of responsibly reducing paperwork should be supported. But waiving fines and placing a new special advocate in each agency would not accomplish this.

2. The Mandates Information Act

In May, the House passed the Mandates Information Act (H.R. 3534), which sought to offer procedural protections against legislation affecting the private sector, such as the Clean Air Act. This legislation was based on the faulty premise that industry is being asked to bear unfair and inappropriate costs to deliver safe and healthy living and working environments to the American people.

H.R. 3534 would institutionalize a one-sided tilt of the legislative process that completely ignores the benefits of public protections. Specifically, the bill includes a provision that allows members of Congress to raise a point of order against considering bills with private sector costs estimated to exceed $100 million. This means that a bill could have benefits that vastly outweigh its costs, but still be held up or stopped by the proposed congressional procedures.

Moreover, contrary to claims that the point of order would increase accountability, this procedure would only create an opportunity for members of Congress to kill or delay important health and safety protections without directly voting against them.

H.R. 3534 would also require the Congressional Budget Office (CBO) to engage in detailed cost estimates of bills before Congress. These estimates are inherently dicey even for federal agencies that take years in assessing costs before issuing regulations. Time and time again, actual compliance costs come in lower than what was originally predicted. EPA, for example, recently estimated that acid rain controls would cost about $600 per ton; the industry estimate was more than $1,000 per ton; yet the actual cost today is less than $100 per ton, billions of dollars less than what was initially thought.

Because of the inherent time constraints in evaluating pending legislation, CBO would be forced to rely almost exclusively on industry data, without being required to examine corresponding benefits. This institutional slant would inevitably distort debate and could lead to the defeat of important public protections.

Another problem with evaluating the costs of legislation is that many statutes delegate significant authority to regulators to develop specific rules. Given agency expertise, this delegation often makes sense. But under H.R. 3534, CBO would be forced to make estimates based on very broad statutory language, before such language was translated into regulations. It is difficult to see how this information would be of real use to Congress—outside of pushing an ideological agenda to thwart new public safeguards.

The bill, which seeks to expand the Unfunded Mandates Reform Act of 1995, does contain civil rights exemptions that were won during the negotiations for that law.

3. Congressional Office of Regulatory Analysis

Several House committees reported out a bill (H.R. 1704) creating a Congressional Office of Regulatory Analysis to analyze and review agency regulations. This legislation, which includes no exemption for civil rights, was never taken up on the House floor, but the sponsor, Representative Sue Kelly (R-NY), has indicated she will continue to push the idea in the next Congress.

With the enactment of the Congressional Review Act in the 104th Congress, lawmakers gained the power to veto agency rules. Yet, so far, no rule has been voted down, and very few "resolutions of disapproval" have even been introduced. Representative Kelly has expressed a desire to see more "resolutions of disapproval" and thinks her bill would do the trick. But this is highly unlikely given the political aversion to voting outright against public health and safety protections. What is certain is that Representative Kelly's bill would create massive bureaucratic redundancy.

Congress already has access to the cost analyses required by the bill. Agencies complete cost-benefit analyses for each major rule, OMB reviews those analyses, and CBO conducts cost estimates as required by the Unfunded Mandates Reform Act of 1995. It makes no sense for a separate body to repeat all those functions. As for accessibility to that information, agencies must now submit all proposed rules to the parliamentarian and leadership in both the House and Senate, and the General Accounting Office provides the details of each agency rulemaking (including cost-benefit analysis, risk assessment, and small business panel recommendations) through its web site.

Moreover, H.R. 1704 would undermine the public accountability that is ingrained in the rulemaking process. Currently, the Administrative Procedure Act requires agencies to take a number of steps (e.g., public notice and comment) to ensure openness and fairness in the rulemaking process. None of these requirements would apply to the new Congressional Office of Regulatory Analysis, even though the work of this office could dramatically affect the outcome of important health, safety, and environmental protections.

And again, as with other regulatory "reform" bills, H.R. 1704 would provide an excuse to focus more on cost and less on public protections. Not only would the office have to conduct detailed cost-benefit analyses, it would have to determine the "net benefits" of each rule. As highlighted in the debate over previous regulatory "reform" proposals, such a test has serious flaws—costs are much easier to monetize than benefits such as the value of a healthy child. In addition, Congress would be placed in the position of describing "lower cost" regulatory alternatives for the way the executive branch is to execute its duties, which raises serious Constitutional questions over the separation of powers.

II. Silencing the Advocacy Voice of Charities

A. Background

Civil rights organizations play an essential role in the public policy process, giving those with limited resources an opportunity to make their voices heard. Particularly for low-income and minority populations, nonprofit civil rights groups often serve as a means of direct communication to government at the local, state, and federal levels. By helping to provide a "voice for the voiceless," these nonprofits help to maintain the health of our democracy.

In 1976, Congress passed a major revision to the Internal Revenue Code, including language clarifying the advocacy rights of organizations incorporated under section 501(c)(3) of the Code (i.e., charitable organizations).[12] According to the law—and the comments of members of Congress in debating the law—charities are not only allowed but encouraged to speak out on public policy matters, so long as they remain within the limits set by the Internal Revenue Service. These limits include a ban on electioneering and limits on lobbying as a percentage of a charity's overall budget.

Several times during the 1980s, the Reagan Administration attempted to severely curtail these rights, particularly for those charities that receive federal grants. The most prominent of these attempts was a 1983 proposal by OMB to prohibit nonprofits that receive federal grants from engaging in public policy matters.[13] After a firestorm of protest from the nonprofit sector and other players, OMB backed off of this effort, publishing a final rule that prohibits the use of federal funds for lobbying unless specifically authorized by statute.[14] This is consistent with existing statutory provisions.

Between the end of the Reagan Administration and the Republican takeover of Congress in the 1994 elections, there were few attempts to restrict nonprofit advocacy. However, with the opening of the 104th Congress, a new series of attacks began, most notably with the several versions of the Istook Amendment,[15] sponsored primarily by Representatives Ernest Istook (R-OK), Robert Ehrlich (R-MD), and David McIntosh (R-IN), in a variety of bills in late 1995 and early 1996. The Istook Amendment was strikingly similar to the objective of the 1983 OMB proposal. These attacks were ultimately unsuccessful in limiting nonprofit advocacy rights, but they did manage to awaken thousands of charities—across the spectrum of ideology and issue areas—to the threat to their advocacy rights.

In response to the threat of the Istook Amendment, a new coalition was formed to protect the advocacy rights of nonprofits. The Let America Speak Coalition, co-chaired by the Alliance for Justice, Independent Sector, and OMB Watch, provides free e-mail and fax alerts to thousands of charities around the country who are interested in nonprofit advocacy issues.

After the defeat of the Istook Amendment, Representatives Istook, Ehrlich, and McIntosh promised to continue to push for these kinds of restrictions, possibly through more piecemeal legislation rather than the overarching original amendment. Events over the past two years have shown this to be true, with a wide variety of attacks on nonprofit advocacy at both the federal and state levels. The following is a review of some of these attacks, and the Clinton Administration's record on these issues.

B. Charity Tax Credit

In the past few years, there have been a number of attempts—one successful—to create a tax credit for contributions to certain charitable organizations. Such a tax credit appears at first glance to be a benefit to nonprofits, increasing the incentive for individuals to increase their support for charitable causes. However, because of restrictions placed on the types of organizations that could receive the credit and the ways in which these proposals would account for the costs, all of these proposals represent significant risks to the civil rights community.

Although the various proposals had different features, there were a number of similar provisions among the bills, including:

- Prohibitions or restrictions on advocacy and legal actions by organizations that participate in the tax credit program, giving the impression that there is something inappropriate or "dirty" about nonprofits engaging in lobbying and litigation;

- Restrictions on eligibility for the tax credit to organizations that predominantly serve the poor, thus indicating that other organizations—such as those serving the civil rights, women's, or the environmental communities—are somehow less worthy of contributions; and

- Reductions or redirections of government spending to offset the costs of the charity tax credit, lessening the ability of the government to provide oversight for the programs it funds and also reducing its ability to set its own funding priorities.

Among the bills that failed were the American Community Renewal Act (H.R. 3865 and H.R. 1031), sponsored by Representatives J.C. Watts (R-OK) and Jim Talent (R-MO), and the Real Life Community Renewal Act, sponsored by Senator Dan Coats (R-IN) in the Senate (S. 1994) and Representative John Kasich (R-OH) in the House (H.R. 4255). In addition, several states are considering charitable tax credit provisions. For example, the Pennsylvania State Senate has considered its own version of a charity tax credit (Senate Bill 1253), and it is likely to do so again in the next session.[16]

Some of the state tax credit programs may be tied to a provision that was included in the reauthorization of the Community Services Block Grant (CSBG) program that passed Congress in 1998. This version allows states to set up a charity tax credit for certain charities and to use CSBG discretionary funds to replace the amount of revenue lost as a result of the tax credit. The state may use these "replacement funds" for nearly any purpose, including for activities that have nothing to do with serving poor people. The provision was originally added in August 1998 to the House version of the CSBG reauthorization (H.R. 4271) by Representatives Mark Souder (R-IN) and Bobby Scott (D-VA), and it was incorporated into the Senate version (S. 2206) in the Conference Committee. The President signed the bill into law on October 27, 1998.

The specifics of this provision raise several concerns for nonprofits that deal with civil rights issues. First, the tax credit will only be available for donations to certain "qualified" charities—namely, those whose predominant activities include direct services within the United States to individuals and families whose annual incomes generally do not exceed 185% of the official poverty line. As mentioned earlier, this will likely create a hierarchy among charities that does not exist currently, with charities that directly serve the poor given a special status, while those that focus on women's rights or civil rights or the environment, or those that work internationally rather than domestically, are relegated to a secondary status. Second, only charities that spend at least 75% of their budgets on "direct services" are eligible, and such services as legal services and advocacy are explicitly exempted from the "direct services" designation. Thus, charities are being discouraged from engaging in these essential activities as they try to serve their constituencies. Finally, allowing states to use discretionary funds to replace revenue lost from the tax credit for any purpose could potentially lead to the loss of funds for community services.

Because of concerns raised by supporters of nonprofit advocacy through the Let America Speak Coalition, House and Senate conferees made several key changes to the charitable tax credit provision that passed the House in August. For example, the original version of the provision allowed states to use a portion of the discretionary funds from the CSBG grants to set up and administer the tax credit program. In the final bill, set-up and administrative costs are required to fall within the 5% administrative cap for the entire CSBG grant. This makes the creation of a tax credit program less attractive for states.

The Clinton Administration has had a mixed record on the charity tax credit. Several Administration officials opposed the idea in 1996, but there has been no official policy statement on the issue. In addition, the President signed the CSBG reauthorization which included the tax credit provision, and the Administration did not attempt to have the provision removed in negotiations over the bill.

C. "Paycheck Protection"

Throughout 1998, there have been efforts to pass one of several versions of "paycheck protection" in more than 25 state legislatures, in 4 states via ballot initiative, and in Congress. Although aimed primarily at restricting the use of union dues for campaign purposes, many of these efforts were written so broadly that they would have affected the right of nonprofit organizations to engage in advocacy. These efforts were unsuccessful everywhere except Wyoming, where the legislation was written very narrowly and did not affect nonprofit advocacy.

The congressional version of "paycheck protection," the Campaign Reform and Election Integrity Act (H.R. 3485 and later H.R. 3581), sponsored by Representative Bill Thomas (R-CA), which was considered by the House of Representatives at the end of March 1998, briefly included a provision that would have directly affected nonprofits' ability to advocate for or against—or even educate the public about—federal laws and regulations. Because of the opposition voiced by the nonprofit community, including a letter from more than 450 organizations, the provision was removed just a few hours before the bill was brought to the floor.

The provision in question would have required nonprofit organizations to ask for consent from their members every year to use their funds for "political activity." "Political activity" was defined as activities to influence elections, federal legislation, federal regulations, or educating individuals about candidates for federal office or about federal legislation, laws, or regulations. Nonprofits would have been required to send an annual notice to their members indicating how much they expected to spend on political activities in the forthcoming year and to get permission from their members for that budget. Nonprofits would not have been allowed to increase these "approved" budgets for any reason, even to respond to crises.

Ultimately, neither the nonprofit provision nor the bill as a whole was able to survive, and the bill was defeated 337 to 74. However, the issue of "paycheck protection" did not die with this bill; it simply migrated to the state level.

The most widely publicized state-level "paycheck protection" fight took place in California, where Proposition 226 appeared on the ballot on June 2. Among other things, Proposition 226 would have prohibited employers from deducting funds from an employee's wages if the employer "knows or has reason to know" that the funds would be used in whole or in part for "political purposes" unless the employer received explicit permission from each employee to have his or her money used for political purposes. "Political purposes" is defined in California law as attempting to influence voters in support of or opposition to a candidate or ballot measure at the state or local level.

Charities are prohibited from engaging in support of or opposition to candidates, but they are allowed to support or oppose ballot initiatives in the same way that they are allowed to lobby the legislature. In this case, the legislature is the voting population. Thus, in addition to union dues, Proposition

226 would have affected any charitable contributions made through workplace giving programs such as the United Way or alternative giving programs such as the Black United Fund, Earth Share, or the United Latino Fund. Many civil rights organizations that receive money through workplace giving programs work on ballot measures, such as those dealing with affirmative action or bilingual education.

Because of Proposition 226's potential impact on charities, nonprofit organizations began speaking out against the initiative, arguing that it would have unintended consequences harmful to the nonprofit sector. Supporters of the measure argued that the initiative would not affect charities, but the California Legislative Counsel, the Senate Office of Research, and the State Controller's Office all stated that nonprofits that engage in ballot initiatives would be affected. Although the United Way initially spoke out in opposition to the initiative, they were placed under severe pressure from supporters of the initiative—including Governor Pete Wilson—and were forced to back away from their opposition. However, voters grasped the danger of Proposition 226 and defeated it 53% to 47%, despite the fact that the proposition led in polls by as much as 40 points earlier in the year.

Following the loss in California, the "paycheck protection" movement seemed to lose its momentum. Promised attempts to pass the legislation at the national level never materialized, and state legislatures defeated the measures or ended their sessions without considering them. In Colorado, "paycheck protection" supporters withdrew their initiative before it qualified for the ballot, and Nevada's courts declared a ballot measure there unconstitutional before it was even voted on. Only Oregon managed to get a "paycheck protection" measure on the ballot in November, and it was defeated by a 53% to 47% margin.

The Clinton Administration actively opposed all efforts to pass "paycheck protection" measures, but they based their opposition on the fact that these measures constituted an attack on unions. The Administration did not comment on the potential impact on nonprofit advocacy.

D. Other Challenges to Nonprofit Advocacy

1. Istook Amendment Reappears, Then Disappears

In May 1998, Representative Roy Blunt (R-MO) filed an amendment to the campaign finance reform legislation being considered in the House that was virtually identical to the original 1995 Istook Anti-Advocacy Amendment that would have silenced America's charities.[17] The Amendment would have restricted the amount of privately raised funds a federal grantee could use to do advocacy and lobbying. If a federal grantee spent more than the specified threshold, it would have been barred from receiving federal grants. These same restrictions would not have applied to federal contracts, loans, or tax subsidies. The Blunt Amendment was filed with the House Rules Committee as a non-germane amendment, which meant that it had to receive approval from the Committee in order to be considered during floor debate. After the Rules Committee and Blunt received calls from charities around the country concerned about the possibility of facing another major battle over the Istook Amendment, Representative Blunt withdrew his amendment.

The Clinton Administration has had a longstanding policy of opposing the language of this bill, dating to the Istook Amendment battles in the 104th Congress.

2. Georgia House Passes State-Level Version of Istook Amendment

The Georgia House passed a bill (S.B. 474) containing a provision that would have prohibited nonprofits that receive state funds from lobbying, even with their own private funds. Under pressure from the nonprofit community, however, the House removed the language in the closing minutes of the session.

Soon after the bill with the amendment passed the House, the Senate refused to incorporate the lobbying ban in its bill, forcing the House to choose between accepting the Senate version of the bill or sending it to conference committee. Led by the Nonprofit Resource Center in Atlanta, Georgia, nonprofits quickly worked to educate the House members about the anti-advocacy provision, and the House agreed to accept the Senate version.

The Nonprofit Resource Center is now working to remove a provision in state law prohibiting nonprofits that receive state funds from engaging in ballot initiatives.

3. Anti-Advocacy Efforts Go Global

Legislation containing a requirement that foreign nonprofits relinquish their advocacy rights as a condition of receiving U.S. family planning assistance overseas passed the House and Senate in the spring of 1998. This proposition was part of the State Department authorization bill (H.R. 1757).

The provision, sponsored by Representative Chris Smith (R-NJ), would have disqualified foreign nongovernmental organizations from receiving family planning funds if—using their own funds and within their own borders—they engaged in any type of advocacy aimed at their own government relating to abortion, pro or con.

Representative Smith also attempted to add the anti-advocacy language to other bills regarding U.S. arrears to the United Nations (U.N.) and funding for the International Monetary Fund (IMF). In addition, the Senate delayed sending H.R. 1757 to the White House, hoping to increase pressure on the President to sign it. In the flurry of activity to finish legislative action and leave town in October 1998, Congress and the President came to an agreement in which H.R. 1757 was vetoed, the IMF received funding, and the U.N. received limited funding. The anti-advocacy language was not part of any of the enacted legislation. This issue, however, is sure to resurface. The Clinton Administration strongly opposes the global anti-advocacy provision.

4. Juvenile Justice Act

The Juvenile Justice and Delinquency Prevention Act of 1974 contains language prohibiting the use of funds appropriated under the act for lobbying at the local level, a problematic clause because of the difficulty of distinguishing legislative and executive functions at the local level. The Violent and Repeat Juvenile Offender Act of 1997 (S. 10), which would have amended the Juvenile Justice Act, retained the local lobbying restriction and added a prohibition on the use of these funds for taking legal action against any federal, state, or local agency, institution, or individual. The lobbying prohibition is inconsistent with OMB's 1983 rule (Circular A-122); and the anti-legal action language is unprecedented in federal law. S. 10 passed the Senate Judiciary Committee before the end of the 1997 congressional session but did not come to the floor in 1998. The Clinton Administration did not take a position on the advocacy provisions of this bill.

5. "Truth in Testimony" Rule

The House of Representatives passed a rule in January 1997 requiring nongovernmental witnesses at congressional hearings to include information in their testimony indicating the amount and sources of any federal funding their group received during the current and past two fiscal years, including both grants and contracts. Such reports must include information about any "entity represented by the witness"—problematic for national organizations with local chapters or organizations representing coalitions. Enforcement of the rule has varied from House committee to committee. The rule does not apply to the Senate.

6. The Clinton Administration on Nonprofit Advocacy

The Clinton Administration has consistently opposed increasing restrictions on the advocacy rights of nonprofit organizations. Although the Administration did not take specific positions on most of these bills (the primary exception being the international family planning issue), it appears that the Administration remains sympathetic to the cause of nonprofit advocacy.

E. Future Issues

Although supporters of nonprofit advocacy rights have been very successful in fending off attacks from a variety of sources, it is unlikely that these attacks will dissipate any time soon. Thus, the nonprofit sector must continue to speak with one voice to maintain its advocacy rights. The strength of the movement to protect advocacy rights appears to come from the diversity of its supporters, who deal with issues ranging from civil rights to women's rights to the environment to worker safety to children's health, and who address issues from national, state, and local perspectives. It is the unified message of support for nonprofit engagement in public policy discussions that makes it possible for charities to play their role as the voice for the voiceless and help keep citizens engaged with their government.

III. Access to Government Information

We are becoming an increasingly connected world. Getting information about a subject is as simple as getting on the Internet and doing a search. So it is surprising that, even though the federal government performs nursing home quality inspections, families cannot easily obtain information about nearby facilities. Nor is information relating to bank inspections, food safety information, or workplace hazards and accidents readily accessible. And while the government makes information available through the Internet about toxic releases in communities, corporate filings, and census data, there is no easy way for the public to find this information. Even when the information can be found, it is not linked together to allow the public to address key issues, such as the placement of a facility in a community with large numbers of minority children.

Government information can be an empowering tool when it all comes together and when the public understands how to obtain and use it. The experience of Florence Robinson, an African American woman from a predominately black neighborhood in North Baton Rouge, Louisiana, demonstrates the power of access to government information. As a volunteer for a small nonprofit, she attended a training session for grassroots groups and saw someone search RTK NET, *http://www.rtk.net*, an online service providing EPA data on toxic chemicals. The search, which took less than a minute, yielded a detailed list of toxic chemical shipments to a Rollins incinerator near her house—just the type of information she had been seeking in her fight against the incinerator.

After the training, she bought a modem and began using online databases, such as RTK NET. Within one year, she became proficient enough not only to download information from RTK NET, but also to link it with census information. She drew a map of what she learned and prepared testimony for a hearing conducted by the U.S. Commission on Civil Rights. Her comments helped guide the Civil Rights Commission in its search for evidence of a link between the location of polluting industries and race. Since then, Florence Robinson and her organization, the North Baton Rouge Environmental Association, have become leaders in educating others on how to use the Internet to obtain critical information to become effective advocates.

This is just one example—of thousands—of why there is a need to build a plan for strengthening public access to government information. Virtually every research agenda or policy campaign—whether to address environmental and social injustices, strengthen corporate accountability, bring greater transparency to governmental decision-making and actions, improve our health care system, or make our elections fairer—depends on government information. In fact, public access issues are probably a significant common thread that binds the civil rights community, regardless of organizational mission and ideology. Moreover, the trends in federal government toward devolution of programs to the states and toward reinvention of government, as well as the calls for greater accountability, will all require accurate, comparable, timely, and accessible information for their appropriate implementation.

Government leaders in recent years have both expressed and demonstrated interest in enhancing public access to government, but that interest has not translated into widespread agency practices. The reasons for this are not cost—public access costs are relatively small. Nor are they technological—an increasing number of people have access to the Internet and it is not very difficult to make government information available in searchable formats. The real reason is that there is no *comprehensive* plan for public access or even specific government-wide policies to guide agencies on use of the World Wide Web.

At the same time, there is enormous opportunity for the civil rights community to capitalize on this new Internet age and the potential that increased access brings. Accordingly, this section looks at the Clinton Administration's efforts to implement the new Electronic Freedom of Information Act amendments, the Government Information Locator System, and agency search engines, as well as comments generally about agency public access activities.

A. EFOIA

1. Background on FOIA and EFOIA

The Freedom of Information Act (FOIA) was first signed into law in 1966. Through this Act, every citizen of the United States gained the right to access and obtain reproductions of records created and maintained by federal government agencies. The Act was originally created to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

Since 1966, the Freedom of Information Act has been amended six times: in 1974 (with minor amendments in 1976, 1978, and 1984), in 1986, and, most recently, in 1996. In each instance, the original Act has been broadened to include more information deemed necessary to the public as well as to the oversight of the federal government.

The Freedom of Information Act covers records created within federal departments, agencies, and corporations. As defined by the Act, records include paper documents, films, tapes, and other materials created or obtained by an agency as part of its official duties. The 1996 amendments make clear that records also include electronically created information such as databases, word processing, and e-mail.

Under the FOIA, federal entities are required to disclose records after receipt of a written citizen request, unless the records fall within one of the nine exemptions to the Act. Records may be withheld from the public if they are:

- Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and are classified as such;
- Related solely to the internal personnel rules and practices of any agency;
- Specifically exempted from disclosure by statute;
- Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
- Interagency or intra-agency memoranda or letters which would not be available by law to a party, other than an agency, in litigation with the agency;
- Personnel or medical files;
- Records or information compiled for law enforcement purposes;
- Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; or
- Geological and geophysical information and data.[18]

The original Freedom of Information Act has been viewed by journalists, public interest organizations, and citizens as an important tool in opening federal agency policies and practices to public scrutiny. The congressional findings accompanying the 1996 Amendments to the Act state that the FOIA has "led to the disclosure of waste, fraud, abuse and wrongdoing in the Federal Government," and has "led to the identification of unsafe consumer products, harmful drugs, and serious health hazards."[19]

In general, the intent of the 1996 Amendments was to provide more prompt and less complicated access to federal government records through the use of electronic communication. As noted in the floor debate, members of the public, through the Freedom of Information Act, regularly request more than 600,000 records a year from federal agencies, a volume that threatens to overwhelm some agencies. The Federal Bureau of Investigation, for example, has a "4-year lag" in fulfilling FOIA requests.[20] Both representatives and senators in their debate on these amendments noted that citizens should not have to wait this long to access information about the workings of their own government. Representative Stephen Horn said bluntly that this lag was "simply unacceptable in a free society."[21]

Because the Act benefits information-seekers regardless of their political affiliation, the 1996 Amendments received widespread bipartisan support, passing on a vote of 402 to 0 in the House, and by voice vote in the Senate. President Clinton concurred with the important function of this legislation, and signed the Electronic Freedom of Information Act (EFOIA) into law on October 2, 1996.

2. Requirements of the 1996 EFOIA Amendments

a. Electronic Reading Rooms

The 1996 Amendments require agencies to make any of the following "reading room" records created on or after November 1, 1996, available online by November 1, 1997:

- Opinions from agency adjudications, policy statements and interpretations adopted by the agency but not published in the Federal Register, and staff manuals and instructions that affect the public;[22] and
- A new category of records—"repeatedly requested" records (created on or after November 1, 1996) that have been processed and released in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."

If these records cannot be accessed online by November 1, 1997, they must be made available through other electronic means, such as disk or CD-ROM, by the November 1, 1997, deadline.

FOIA-processed, "repeatedly requested," records created prior to November 1, 1996, are also to be made available in the conventional (nonelectronic) agency reading room.

b. Reference Guides

The 1996 Amendments created a new set of agency requirements to aid the public in accessing federal government information. By March 31, 1997, each agency was required to provide, in its reading room and through an electronic site,[23] reference material or a guide on how to request records from the agency. This reference guide must include:

- An index of all major information systems of the agency;
- A description of major information and record locator systems maintained by the agency; and
- A handbook for obtaining various types and categories of public information from the agency, both through FOIA requests and through non-FOIA means.

By December 31, 1999, each agency must provide an electronic index of all "repeatedly requested" records, regardless of date of creation.

c. Electronic Records

In addition, the 1996 Amendments explicitly state that records maintained by the agency in electronic form are subject to the FOIA. For example, if an agency maintains an electronic database of information, a citizen may request the agency to search that database for requested information and produce an electronic copy of the information. An agency is required, moreover, to "make reasonable efforts to maintain its records in forms or formats that are reproducible for the purposes of the [FOIA]."

3. OMB Guidance on the EFOIA

OMB is responsible, because of its duties under the Paperwork Reduction Act, for providing formal guidance to agencies regarding the implementation of the new FOIA provisions. Moreover, the legislative history shows that Congress expected OMB to give guidance on the reference guides in particular. On April 7, 1997, OMB distributed a memorandum to agencies on how to fulfill the March 31, 1997, requirements for a paper and online Freedom of Information index and guide.[24] Distributed a full week after the statutory deadline for agencies to complete the tasks it addressed, the memorandum offered minimal guidance on the new amendments. To fulfill the index requirements, OMB recommended "establishing a Government Information Locator Service (GILS) presence," in accordance with a 1994 OMB Bulletin.

While all agencies should have a well-maintained GILS, this alone does not fulfill the more substantial EFOIA amendment requirements. (As described below, most agencies do not have a well-maintained GILS.) The 1994 OMB Bulletin on GILS instructed agencies to "compile an inventory" of their "automated information systems," "Privacy Act systems of records," and "locators that together cover all . . . information dissemination products," and describe each of these three by "GILS Core locator records . . . made available online."[25] The EFOIA, however, does not limit agency reference guides to "automated information systems," but rather requires an index of "all major information systems," a much broader category of information.[26]

OMB also instructed agencies that GILS must include locators for "information dissemination products," a definition that includes only locators for catalogs of information disseminated to the public. The EFOIA, on the other hand, does not use this strict definition, and includes locators for records that are not currently disseminated to the public.

Finally, entire classes of information—automated electronic mail and word processing systems—were specifically included in the EFOIA legislation but were exempted from GILS. Therefore, agencies that follow OMB's advice of using GILS to fulfill their obligations will fall far short of meeting the EFOIA's requirements. Moreover, as noted below, there is uneven and inadequate agency compliance with GILS—and no OMB enforcement of the GILS mandate.

OMB also suggested that agencies create a guide for obtaining FOIA information. OMB explained that this guide should include:

- The location of reading rooms within the agency and its major field offices;
- A brief description of the types and categories of information available in these reading rooms;
- The location of the agency's World Wide Web home page;
- A reference to the agency's FOIA regulations and how to get a copy; and
- A reference to the agency's FOIA annual report and how to get a copy.

These suggestions also fall far short of what is needed to fulfill the EFOIA. With this memo, OMB seems to have overlooked the intent of the EFOIA legislation—to provide easier access to government information electronically. Providing an address or phone number for more information as OMB suggests only lengthens the search process for citizens. Nothing less than providing an actual "how to" guide or agency records online fulfills the intent of the amendments. In addition, no encouragement was given to agencies to create an electronic reading room to find important and repeatedly requested agency information online.

Working in this void, many agencies have looked to the Department of Justice (DOJ) for help. Fortunately, DOJ has provided a quality example of an EFOIA electronic reading room, the complete text of the new amendments, and a guidebook on how to submit agency end-of-the-year FOIA reports. Without this resource, many agencies would be lost in their attempts to fulfill this mandate.

On December 4, 1997, Public Citizen, a nonprofit public interest organization, filed a federal lawsuit to enforce the EFOIA. Seven federal agencies (OMB, the Office of Administration in the Executive Office of the President, the Office of the U.S. Trade Representative, the Department of Education, the Department of Energy, DOJ, and the Department of State) were sued for failure to comply with the EFOIA requirements. The outcome of this litigation has yet to be decided in federal court.

4. Agency Compliance with the EFOIA

OMB Watch conducted a survey of federal agencies to assess compliance with the EFOIA.[27] The study found that compliance has been overwhelmingly inadequate in that a majority of agencies had not yet met their obligations to provide electronically all information outlined in the amendments.

This survey was based on an examination of 135 federal EFOIA web sites to determine the level of compliance with the 1996 Amendments. To substantiate this initial research, a letter requesting information regarding the current status of and future plans for meeting the EFOIA amendments was sent to 84 agencies and commissions. Of the 84 requests for information sent, 39 were returned. Of these, two-thirds treated our letter as a FOIA request; half of these sent no further information.

Overall, the OMB Watch study found that:

- In a majority of 135 EFOIA web sites, EFOIA information is difficult to find online. It is rarely visible on the agency's main home page, and it often takes a great deal of searching to find even a hint. Although the 1996 Amendments did not require that the information be easily found, this is essential to meaningful public use.

- More specifically, of the 57 agencies responding, 13 (23%) have no EFOIA presence, 44 (73%) have varying degrees of compliance with the requirements, and, as of January 31, 1998, none had complied fully with the amendments.

- While the vast majority of agencies have yet to fulfill the requirements of the amendments, there are a number of agencies that should be applauded for their exemplary work in implementing the EFOIA. For example, the Department of Defense and the Federal Communications Commission maintain excellent search engines and home pages to make research easy and information accessible. Others, such as the Small Business Administration and the National Science Foundation, provide forms to submit FOIA requests online, accelerating the public's access to federal government information. Still others, such as the Veterans' Administration, accommodate a variety of low-tech and high-tech users by using both audio-visual and text-only sites. Many of the agencies that work closely with the civil rights community, such as the Equal Employment Opportunity Commission, have poor compliance.

- In the best cases, agencies see the EFOIA as an opportunity to help both citizens and themselves. Many agencies have found that when information frequently requested under FOIA is provided electronically, especially over the Internet, the number of requests for this information declines substantially and agency resources are saved.

- In agencies that have decentralized the responsibility for the EFOIA to satellite offices in different units within the agency, there is often an uneven dissemination of information due to a "hands-off" approach. While some departments or bureaus of an agency have excellent EFOIA guides, indices, and reading rooms, others have absolutely no information disseminated online.

- Agencies are moving at a great speed to provide information online. Unfortunately, this information is often unorganized, unrelated, and difficult to find. In many cases, agencies may have complied with EFOIA requirements, but we were unable to verify this compliance because no clear markers for this information existed on their web sites.

B. Government Information Locator Service

1. What is GILS?

The U.S. Government Information Locator Service (GILS), which is mandated under the Paperwork Reduction Act, is a standard for identifying, locating, and describing publicly available federal information resources, including electronic information resources. GILS records identify public information resources within the federal government, describe the information available in these resources, and instruct the user in how to obtain the information. It is essentially a cataloging format that uses international standards for information search and retrieval so that information about information—metadata—can be retrieved in a variety of ways, including through access to the information itself, if the creator of the record so decides.

If GILS and the EFOIA live up to their potential, the public will have a comprehensive system to find and retrieve government information. Interested in possible discriminatory lending patterns? How about whether new communications technology is being deployed in a manner that skips communities of color or low-income communities? How about whether environmental injustices are also creating unfair health risks? Need the latest information about employment discrimination? In the best of worlds, the public should be able to use the Internet to easily find, obtain, and use government information to answer these types of questions. If GILS or the EFOIA falls short of its potential, then the civil rights community and others lose.

Thus, in today's world, protecting our right of access to government information requires a firm understanding of technology and an active participation in development of the "infrastructure" to promote access. Unfortunately, the GILS framework is largely inadequate for promoting meaningful public access.

2. Background on GILS

GILS is a successor to the Federal Information Locator System (FILS), a statutory requirement under the 1980 Paperwork Reduction Act—which also created the Office for Information and Regulatory Affairs (OIRA) in OMB. During the early 1980s, OIRA turned FILS over to the Department of Defense (DOD), leaving OIRA to focus its energies on reducing paperwork. At the time, agencies were required to use FILS to check for duplication, and to pay a high fee to do so. The 1986 reauthorization of the Paperwork Reduction Act revised OIRA's FILS mandate, requiring FILS to "be designed so as to assist agencies and the public in locating existing government information derived from information collection requests." As in earlier years, nothing happened. Finally, in October 1988, OMB ended the DOD's operation of FILS. In October 1989, OMB announced the availability of an "indexed summary" of FILS data in paper, microfiche, and computer diskette formats. The public could purchase the "FILS data file document" from the National Technical Information Service (NTIS) or use a computer printout located at OMB.[28]

The limitations of FILS were obvious. It contained only paperwork cleared by OMB. It did not include other agency information—such as internal documents, interagency reporting information, public dissemination products, and archived information. And the system could not be accessed directly by other agencies or the public. In 1990, recognizing the limitations of FILS, OMB commissioned a study to be undertaken by Syracuse University, whose purpose was to "review the existing policy system regarding inventory/locator systems, clarify the objectives and uses for such systems, and discuss issues and criteria related to how such systems can best meet the needs of both government agencies and the general public."[29]

In November 1993, OMB, together with the Information Policy Committee of the Information Infrastructure Task Force, published a Federal Register notice of the promotion of "the establishment of an agency-based Government Information Locator Service (GILS)." The Notice stated that "GILS would identify public information resources throughout the Federal Government, describe the information available in those resources and provide assistance in how to obtain the information"; that "public comment would be served by GILS directly or through intermediaries"; and that "GILS would use network technology and the ANSI Z39.50 standard for information search and retrieval."

On December 7, 1994, OMB formally announced the implementation of GILS in OMB Bulletin 95-01. The Bulletin mandated that the head of each agency should: "By December 31, 1995, compile an inventory of its 1) Automated information systems, 2) Privacy Act systems of records, and 3) locators that together cover all of its information dissemination products." The Bulletin stated that: "Each such automated information system, Privacy Act system of records, and locator of information dissemination products shall be described by a GILS Core locator record that includes the mandatory GILS Core Elements, and appropriate optional GILS Core Elements as defined in FIPS Pub. 192 and 36 CFR 1228.22(b)." The Bulletin specifically excluded as automated information systems "electronic mail and word processing systems." It also established a GILS Board "to evaluate the development and operation of the GILS." The Board was to "prepare and disseminate publicly an annual report that evaluates and recommends enhancements to GILS to meet user information needs, including factors such as accessibility, ease of use, suitability of descriptive language, as well as the accuracy, consistency, timeliness and completeness of coverage."

On December 7, 1997, OMB Bulletin 95-01 expired. Between the issuance of the Bulletin and its expiration, OMB failed to bring the Bulletin and, hence, GILS, into compliance with the language of the 1996 EFOIA Amendments. As noted earlier, OMB has not issued a follow-on Bulletin. OMB did send, belatedly, a Memorandum on February 6, 1993, to the heads of the executive agencies, stating that: "All agencies will now be describing GILS progress in their annual reporting under the Paperwork Reduction Act of 1995. Agencies should also routinely solicit feedback on their GILS performance, results, and plans from significant public stakeholders and user communities."[30] OMB's responsibilities for GILS are nowhere mentioned.

While the GILS Board never did issue annual reports or carry out its mandate, its structure was flawed from the start. The Board's composition excluded the public, a key audience GILS is intended to serve. OMB now instructs the Chief Information Officers (CIO) Council and the Government Information Technology Services Board (GITSB) to deal with GILS issues—although, importantly, not with such critical components as "user information needs, including factors such as accessibility, ease of use, suitability of descriptive language, as well as the accuracy, consistency, timeliness and completeness of coverage."[31]

3. Assessment of GILS

In July 1995, six months after the OMB issued its Bulletin on implementing GILS, OMB Watch published its first assessment of GILS.[32] At that time, agencies had just begun to identify resource holdings and to prepare that information for dissemination on their GILS. The OMB plan was to implement GILS as a decentralized collection of agency-based information locators. While some felt the OMB Bulletin did not go far enough, there was enormous energy both inside and outside of government about the potential of GILS. The first OMB Watch report commented on the initial steps that were being taken, on the serious limitations of the GILS Bulletin, and on OMB's engagement in the process. It also noted that most agencies that had begun implementing GILS were not providing any direct access to the information catalogued, only to the metadata. Thus, it appeared that GILS might become an electronic card catalogue of agency catalogues, falling short of even providing a meaningful or comprehensive card catalogue.

The second year of GILS implementation brought a new series of problems. OMB Watch issued a second report in January 1997, which addressed why GILS had not yet lived up to its promise. It examined the successes and struggles faced by agencies implementing GILS, OMB, and the Administration. Specifically, the report found that some of the concerns voiced in the first OMB Watch report had been corrected, but the vast majority were not only still extant but exacerbated.[33] Over the year and one-half between these reports, only the most minimal expectations were met with regard to GILS. Many agencies had not met the January 1996 deadline for identifying their information holdings, creating GILS records, and posting them electronically. Most had fulfilled only the most basic requirements of the OMB mandate, and others had fallen far short of even the minimum expectations.

OMB Watch issued a third report in August 1998.[34] The report found that since the 1997 report there had not been much additional work done on GILS by most agencies. Three years after the initial mandate, 33 agencies still do not have any GILS records online in any format, including 2 Cabinet level departments—the Department of Justice and the Department of Transportation.

Of the 46 agencies that provided information about how often their GILS records are updated, 31 of them had not updated their GILS records this year. Of these, 12 agencies last updated their records about information holdings prior to 1997—with some dating back to 1995. This creates the misleading impression that there is no new government information in these agencies, when, in fact, the opposite is true. The success of GILS must be measured in terms of the content that is provided, not merely whether there is a GILS presence.

The inadequacy of GILS should come as no surprise, given the hands-off attitude that OMB has taken, including its lack of leadership and an apparent disinterest in its own mandated responsibilities or those of the agencies. Moreover, the lack of opportunity for public involvement has been striking, making GILS a service for the public without any input from the public. It is an understatement to say that GILS has not lived up to its potential.

C. Search Engines

There have been three distinct and widely used search engines for access to government information: Thomas, GPO Access, and a variety of "one-stops." Thomas, named after Thomas Jefferson, was created by Congress and is operated by the Library of Congress. The Clinton Administration has no role in its implementation or oversight. GPO Access is a service created and maintained by the Government Printing Office. Although GPO Access provides services to executive branch agencies, it is part of the legislative branch. Again, the Clinton Administration has no role in its implementation or oversight. The Clinton Administration's role in providing coordinated searching tools has been with respect to implementation of "one-stops," web sites that provide links to information on a specific subject or constituency.

One of the first "one-stops" was the U.S. Business Advisor, ***http://www.business.gov***, developed by the National Performance Review (now called the National Partnerships for Reinventing Government) and the Small Business Administration. As an outgrowth of that experience, during 1997, the White House staff and agency Nonprofit Liaisons worked to develop the NonProfit Gateway, ***http://www.nonprofit.gov***, a web site for nonprofits. The Gateway was an acknowledgment that the government must do more to identify its information holdings and make it available to nonprofits. The Gateway gives the civil rights community access to information about federal grants, nonfinancial support (e.g., donative services), tax code issues, regulations, and much more. Ironically, despite a heavy consultative process inviting nonprofits to give feedback about the design and content at several stages, the civil rights community was largely silent. As the NonProfit Gateway was being developed, a state and local government gateway, ***http://www.statelocal.gov***, was also created.

The Clinton Administration has also been active in developing other types of "one-stops" that are interagency web sites. As of the end of September 1998, a Department of Housing and Urban Development (HUD) site, *http://www.hud.gov/fedcentr.html*, lists 15 other interagency web sites. These include information on federal budget, consumer protection, families and children, health information, and more.

D. Final Comments

Unfortunately, even with the advent of the Internet, access to information needed by the civil rights community is uneven. Some agencies have made great strides in providing public access; others lag far behind. On the positive side, some agencies, such as HUD, have reached out to nonprofits to ask how to improve their web sites. Today, HUD's web site, *http://www.hud.gov/states.html*, permits the public to read local Consolidated Plans and to plot data from the Plans on local maps. One map can show where federal funds, through housing developments or community development projects, are going versus where low-income residents reside, where high unemployment exists, or where minorities live. This graphical representation gives the public a powerful image of how federal funds are being put to use and brings greater accountability and participation.

The Clinton Administration needs a comprehensive plan or policy to deal with public access to information holdings. This plan should identify how use of the web links with GILS, the EFOIA, and other public access requirements and strategies. How does the executive branch link its information with GPO and Thomas (e.g., legislative information), and with judicial information? What does public access truly mean today? Does putting information on the Internet suffice, or does it require agencies to make the information available in useful formats? These are only some of the questions that a comprehensive plan must address.

The Clinton Administration should also make public access a central tenet of governmental policymaking. For example, when the government gives away broadcast spectrum, it should demand that broadcasters, in return, provide the public with access to government information related to their programming. Certain issues, such as greater reliance on use of recycled products, rise to the level of being cross-cutting universal government policy. Public access is an example of such policy.

The Clinton Administration must also address the lack of leadership to guide agencies in pursuing public access opportunities. Even though OMB is statutorily charged with leadership responsibility, it has been absent. Leadership has seemed to migrate to the Chief Information Officers Council, which has not had public access as a central concern and is not a publicly accountable body.

IV. Budget

Nearly every chapter in the Citizens' Commission report—from gender-based protections to welfare to immigration—discusses areas that rely heavily on federal funding. Because of spending caps enacted through the 1990 Budget Enforcement Act, discretionary spending has been a zero sum game. In other words, if Program A received an increase, then Program B would have to cut an amount equal to the increase in Program A. The 1997 balanced budget deal between President Clinton and Congress put these spending caps on a course toward real spending reductions in the near future.

Ironically, a year after the 1997 deal, the government announced that there was a budget surplus when Social Security trust funds were counted in the equation. The Clinton Administration stated that resolving any Social Security crisis must be the first order of business with regard to the surplus. Thus, "Social Security first" became the mantra for stopping proposed tax cuts, as well as increased domestic spending. In the end, however, it did not mean there was no spending increase for military or domestic spending. This was done as "emergency spending" and, therefore, allowed outside the spending caps. Many dubbed the "emergency spending" approach as a budget gimmick to get around FY1999 budget caps.

Despite the reluctance to spend the "surplus" or increase the spending cap, the Administration won increased education funding in the normal appropriations process beyond what the cap would permit. Another gimmick—forward funding of programs—was used. This means that the government has already spent some of next year's (FY2000) money under the already tight spending cap.

According to Senate Budget Committee Staff Director Bill Hoagland, spending authority will need to be cut by about $28.1 billion next year as a result of the tightening caps and the forward funding of programs.[35] This translates into an outlay cut of about $15 billion.

The pressure to cut discretionary spending programs by this amount will be significant for several reasons:

- The "firewall" between non-defense and defense spending will come down, starting October 1, 1999. This means there will be one unified spending cap. The President has already acknowledged the need for increased military spending for readiness activities. The Defense Department will also be proposing other increases in military spending.

- Representative C.W. "Bill" Young (R-FL) will become the new chair of the Appropriations Committee. The fact that he was the chair of the National Security Appropriations Subcommittee, which writes the spending bills for defense, will likely mean he will be predisposed to increase military spending.

- Funding for crime fighting, highway, and mass transit programs has already been protected for this year. Thus, massive cuts will fall disproportionately on other domestic programs, including those that serve disadvantaged communities.

Unless the budget cap can be raised, new dedicated user fees or taxes created, or new gimmicks employed (such as more forward funding), the size of the spending reduction that will be required will be unprecedented. It is ironic that at a time of economic prosperity, relative worldwide peace, and a federal surplus, we face the prospect of historic spending cuts. It is also quite surprising that cuts may occur in the face of well-documented evidence of significant unmet human needs and widespread social problems, ranging from large numbers of children in poverty to large numbers of crumbling schools.

The civil rights community and other human services advocates have been held at bay for years by the federal deficit. Now that the deficit has disappeared there is no excuse for not addressing these concerns. All eyes will be on the Clinton Administration and how it addresses this critical issue. Inevitably, the need for domestic investment will be linked to debates about Social Security. Congress will ask the Administration how much of the surplus should be reserved for fixing the program. Once the Administration provides a specific answer, there will be a rush by some to propose tax cuts for the unspent surplus. The Administration must articulate a different view, speaking forcefully in the earliest stages of the budget process for increasing our investment in domestic initiatives.

Endnotes

[1] Dr. Bass is the founder and Executive Director of OMB Watch. Mr. Lemmon is Manager of OMB Watch's Community Education Center, which, among other things, deals with nonprofit issues. Mr. Rushing is a Policy Analyst at OMB Watch and coordinates the Citizens for Sensible Safeguards coalition that deals with regulatory matters.

[2] The Job Creation and Wage Enhancement Act, H.R. 9, 104th Congress (1995).

[3] The Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Congres (1995).

[4] The Small Business Regulatory Enforcement Fairness Act, Public Law No. 104-121 (1995).

[5] The Unfunded Mandates Reform Act, Public Law No. 104-4 (1996).

[6] Letter from former OMB Director Franklin D. Raines to Senator Fred Thompson, Chairman of the Governmental Affairs Committee (March 6, 1998).

[7] *Id.*

[8] Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulations* (Sep. 30, 1997); Office of Management and Budget, *Draft Report to Congress on the Costs and Benefits of Federal Regulations, in* 63 Federal Register 44,033 (Aug. 17, 1998) (*"Draft Report"*).

[9] *Draft Report*, *supra* note 8, at 44,035.

[10] Executive Order No. 12606 (Sep. 2, 1987).

[11] Executive Order No. 13045, 3 C.F.R. § 13045 (Apr. 21, 1997).

[12] For further information on the 1976 law and its impact on lobbying, see Independent Sector's Charity Lobbying in the Public Interest web site at *http://www.indepsec.org/ clpi/index.html*, or the Internal Revenue Service's explanation of lobbying rules at *http://www.irs.ustreas.gov/prod/forms_pubs/pubs/p5570308.htm*.

[13] See proposed changes to OMB Circular A-122, "Cost Principles for Non-Profit Organizations," 48 Federal Register 3,348-50 (Jan. 24, 1983).

[14] OMB Circular A-122, "Cost Principles for Non-Profit Organizations," 49 Federal Register 18,276-77 (Apr. 27, 1984).

[15] The Istook Amendment refers to a number of attempts to pass similar restrictions on nonprofit lobbying. For more information on the Istook Amendment in its various forms, see the Let America Speak web site's archives at *http://www.rtknet.org/las/archives.html*.

[16] Testimony by Joseph Geiger, Executive Director of the Pennsylvania Association of Nonprofit Organizations, before the Pennsylvania Senate Finance Committee (March 10, 1998).

[17] The Blunt Amendment was submitted to the Rules Committee prior to consideration of the campaign finance bill. The language was circulated by the Rules Committee. After the Amendment was withdrawn, the Blunt office claimed that it was never "filed."

[18] The full wording of these exemptions may be found in 5 U.S.C. § 552(b)(1) - (b)(9).

[19] Electronic Freedom of Information Act Amendments of 1996, H.R. 3802, 142 *Congressional Record* H10447 (1996).

[20] 142 *Congressional Record* H10451 (Sep. 17, 1996) (floor debate on the Electronic Freedom of Information Act Amendments of 1996).

[21] *Id.* (statement of Representative Steve Horn).

[22] Even before the EFOIA amendments were enacted, the Government Printing Office was required to make available online all materials published in the Federal Register.

[23] The statute says that the agency must make the reference material or guide "publicly available." The

House Report says that: "All guides should be available through electronic means, and should be linked to the annual reports." House Report No. 105-795, at 30 (1996). Department of Justice guidance indicates that agencies are required to make the material available in both traditional and electronic reading rooms, as well as releasing it in response to requests. U.S. Department of Justice, Office of Information and Privacy, XVII *FOIA UPDATE* 11 (Fall 1996).

[24] Franklin D. Raines, *Guidance on Developing a Handbook for Individuals Seeking Access to Public Information, M-97-10* (Washington, D.C.: Office of Management and Budget Apr. 7, 1997).

[25] OMB Bulletin 95-01 § 4.a(1) (1994).

[26] 5 U.S.C. § 552(g)(1).

[27] OMB Watch, *Arming the People "...with the power knowledge gives": An OMB Watch Report on the Implementation of the 1996 "EFOIA" Amendments to the Freedom of Information Act* (Apr. 1998).

[28] For a brief history of FILS, see Gary D. Bass and David Plocher, "Finding Government Information: The Federal Information Locator System (FILS)," 8 *Government Information Quarterly* 11 (1991).

[29] Charles McClure, Ann Bishop, Philip Doty, and Pierrette Bergeron, *Federal Information Inventory/Locator Systems: From Burden to Benefit* (School of Information Studies, Syracuse University July 27, 1990).

[30] OMB Memorandum 98-05 (Feb. 6, 1998).

[31] OMB Bulletin 95-01 (1994).

[32] OMB Watch, *People and Their Governments in the Information Age: Putting Government Information Online* (1995).

[33] OMB Watch, *Potholes on the Information Bridge to the 21st Century* (Jan. 1997).

[34] OMB Watch, *Launch and Forget? An OMB Watch Report on the Implementation of the U.S. Federal GILS* (Aug. 1998).

[35] Bud Newman, "FY 2000 Budget Must Cut $28.8 Billion To Stay Within Spending Caps, Aide Says," *Bureau of National Affairs' Daily Tax Report*, Nov. 5, 1998, at G-1.

Chapter VI

Judicial Nominations and Confirmations During the First Half of the Second Clinton Administration

by Elliot Mincberg and Tracy Hahn-Burkett

Introduction

In the first half of the second Clinton Administration (1997–98), the process of nominating and confirming federal judges to Article III courts[1] became a battleground for partisan struggle at a level unprecedented in recent history. The politicization of the process in 1996—which led to substantial delays and numerous incidents of refusal even to consider some nominations—turned out to be a harbinger of things to come. The problem reached a crescendo with the release of Chief Justice Rehnquist's 1997 report on the state of the judiciary,[2] in which the Chief Justice proved to be an unexpected source of criticism of the delays in filling judicial vacancies and the consequences of those delays. Although the fallout from the Chief Justice's report and other vociferous criticisms of the Senate's delay in confirming judges led to an overall improvement of the process by the end of 1998, significant problems remain in both the Senate's confirmation procedures and the Administration's attention to nominations.

Confirmations of federal judges slowed to a trickle in 1997, when the Senate confirmed only 36 judges. Even more disturbing, delays from nomination to confirmation seemed to fall disproportionately on women and ethnic minority judicial nominees, and senators seemed to be in no hurry to fill "judicial emergencies" where vacancies had existed for longer than 18 months. The Senate's record was better in 1998, when 64 judges were confirmed. However, delays and inaction for women and minorities continued at a disproportionate level, and numerous judicial vacancies still remain. The Administration was also slow to nominate candidates for the federal bench in some cases, thereby contributing to the problem of federal judicial vacancies.

The story behind the numbers sheds considerable light on the threats to judicial independence and civil rights posed by the atmosphere that has recently surrounded the appointment of judges to the federal bench. Conservatives both within and outside of the Senate have urged the Senate to hold up the confirmation of some or most of President Clinton's nominees so as to minimize the President's influence on the courts. Even while conservatives criticize the President's picks for the bench, some liberal critics complain that the President is now only nominating "centrist" individuals who can easily be confirmed. Conservative senators have continued to explore candidates' personal views on a wide range of issues in hearings and questionnaires, often refusing to support nominees with whom they do not see eye-to-eye on these issues. In disturbing new trends, judicial nominees have been attacked for their *pro bono* work, and sitting judges increasingly have been threatened with impeachment by conservatives who do not like their decisions from the bench.

The record of the Clinton Administration and the Senate in nominating and confirming judges for the federal bench during 1997–98 is discussed in further detail below. First, we describe the procedures used to select and process candidates, including a comparison with the first Clinton Administration. Second, we analyze the records of the President and the Senate in making and confirming nominations. Finally, we discuss the outlook for judicial nominations over the final two years of the Clinton Administration, including suggestions for promoting excellence and commitment to equal justice in the federal judiciary.

I. Procedures for Nominating and Processing Federal Judgeship Candidates in 1997–98

Procedures for nominating and processing nominees for federal judgeships remained essentially the same in 1997–98 as they have been since the Republicans assumed control of the Senate in 1994. While the politics of the process altered somewhat, most of the technical procedures employed by the President and the Senate did not significantly change.

A. Criteria for Selection

The overall criteria utilized by the President for selecting judges has remained relatively constant throughout his tenure in office thus far. President Clinton has continued to attempt to increase diversity on the federal bench, particularly in light of the extremely low number of women and minorities appointed by Presidents Reagan and Bush. He has also pursued his policy of seeking to appoint as judges "men and women of unquestioned intellect, judicial temperament, broad experience, and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."[3] Particularly in recent years, however, he has also been adhering to an additional criterion: a desire to avoid significant controversy over judgeships. As one Administration official candidly admitted a few years ago, "[w]e've steered clear of a few people who might have been fabulous judges but who would have provoked a fight that we were likely to lose."[4] Some advocates maintain that this course has reduced the number of candidates who possess substantial public interest and civil rights backgrounds in favor of candidates who hail from large firms or who have served as prosecutors.

B. Method of Selection

The general method used by the Administration to select nominees has not changed since its inception. At the district court level, the Administration has primarily followed the historical practice of "senatorial courtesy." Under this procedure, the senior Democratic senator from the state with a judicial vacancy has recommended between one and three candidates for the position. Occasionally, two Democratic senators from a state (and in New York, a Republican and a Democratic senator) have divided up responsibility for suggesting nominees in an agreed-upon fashion. Where there is no Democratic senator, the recommendation has been made by the ranking Democrat in the state's House delegation, the governor, the representative from the specific area, or another official selected in consultation with the White House. The Justice Department and the White House have screened the candidates, and the President has made the final selection.

As during the first part of the Clinton Administration and during previous Republican administrations, the White House has reserved a larger role in finding and selecting nominees to the federal courts of appeal.[5] A significant role has been played by the Office of Counsel at the White House. A variety of sources have provided input, including senators and other officeholders, and again the President has made the final selection after screening has taken place. The White House has continued its first-term practice of consulting Senate Judiciary Committee chairman Orrin Hatch as well as other Republican senators prior to submitting nominations. This routine represents a noticeable change from the practice followed under President Bush, when the Republican Party controlled the presidency and the Democrats controlled the Senate. At that time, there was little consultation with Democratic senators prior to nominations, and the Democratic-controlled Senate Judiciary Committee informally ended the practice under which a nominee's home-state senator could indefinitely delay or "blue-slip" a nominee. In at least some instances, however, the "blue-slip" procedure has been effectively restored for Republican senators since 1994.

C. Investigations and Interviews

1. The Justice Department and the White House

Although some of the names have changed, the basic process for investigating and interviewing candidates for the federal bench during the first half of the second term of the Clinton Administration has not altered significantly from previous practice. As before, both the Justice Department and the White House have played important roles, with the activity at Justice centered in the Office of Policy Development, headed by Assistant Attorney General Eleanor D. Acheson. The focal point for judicial nominations activity at the White House has remained in the Office of Counsel, where the leading role was first played by Jonathan Yarowsky and more recently has been performed by Mark Childress. As before, the Attorney General, White House Counsel, and other Administration officials have participated in the process.

2. The American Bar Association

Traditionally, the American Bar Association's (ABA) Standing Committee on the Federal Judiciary has played a role in the federal nomination process by evaluating the qualifications of candidates for the federal bench. However, beginning in 1996, conservatives mounted a significant rhetorical attack on the ABA, claiming that because the ABA as an organization takes substantive positions on legislation with which conservatives often disagree, its unique role in evaluating nominees should be ended. The ABA and its defenders responded at a Senate Judiciary Committee hearing and elsewhere, pointing out that the work of the Standing Committee was completely separate and insulated from the ABA's lobbying work, that the two had nothing to do with each other, and that the ABA's role remained crucial.[9] The conservative campaign of criticism of the ABA's role continued, however, and in February 1997, Chairman Hatch sent a letter to his colleagues officially terminating the formal role of the ABA in the nominations process. The ABA has continued to evaluate federal judicial nominees for the benefit of members of the Judiciary Committee, but its role is now technically an informal one.

3. The Senate Judiciary Committee

The Senate Judiciary Committee helps the Senate fulfill its constitutional "advice and consent" role on judicial nominations by investigating, holding hearings on, and voting in committee on nominees. Republican Senator Orrin Hatch has chaired the Committee since 1995.

The pace of the Committee's work was excruciatingly slow in 1997: it held only 8 nominations hearings on 40 nominees. By the end of the year, the full Senate had confirmed only 36 nominees, leaving 86 judicial vacancies—comprising approximately 10% of the federal bench. Of these vacancies, 30 were judicial emergencies—where the vacancy had existed for more than 18 months—and nominees for 14 of the judicial emergency vacancies were women or minorities. The rate of confirmation was so dilatory that it did not even keep up with attrition; there were 16 more vacancies on the federal bench at the end of 1997 than there were at the beginning. While the number of judges confirmed in 1997 was certainly higher than the 17 judges confirmed by the Senate in 1996, it pales in comparison to the 55 judges confirmed in 1995 and the 101 judges confirmed in 1994.

The situation improved in 1998 following widespread censure of the delays of 1997. Chairman Hatch held 14 hearings on 64 nominees, and the Senate ultimately confirmed 64 judges, leaving 49 vacancies at the end of the year. However, it is worth noting that 18 of the judges confirmed were confirmed on the very last day of the 105th Congress. In addition, a relatively large number of nominees—20—were returned to the President without Senate action, and 16 of the 20 were not even voted on by the Judiciary Committee.

II. The Record on Judicial Nominations

While the bare numbers of 1998 offer encouragement to anyone concerned about the potential impact of an inadequately staffed judicial system, a look beyond that year's figures demonstrates that it would be ill-advised to become complacent about the situation. Attacks by conservatives on Clinton nominees and on sitting judges threaten to intimidate and impose litmus tests on the individuals charged with dispensing justice in our system of government. Women and minorities still face longer periods of delay on the road to confirmation than do white men. Senate Majority Leader Trent Lott made no attempt to disguise his subordination of the confirmation process to partisan politics, especially in the heat of the fierce budget battle that raged at the end of the 105th Congress's second session. Finally, distracted by other events, the Administration failed to live up to its promises at the end of 1997 and the beginning of 1998 to make the nomination and active support of candidates for the bench a priority.

A. The Overall Record

1. The Record on Minorities and Women

When President Clinton took office, he sought to make appointments to the federal bench that would reflect the broad diversity of the American population served by the judiciary. As retired Judge Leon Higginbotham noted several years ago, individual litigants and the public as a whole will be best served by a judiciary that is "both substantively excellent and respected by the general population[,]" and where those who come before the court can "benefit from the experience of those whose backgrounds reflect the breadth of the American experience . . . ."[7] The President has made significant progress in this area. Over the past 6 years, nearly 27% of the President's nominees to the federal bench have been minorities; almost 18% were African American. In 1997–98, well over 25% were minorities, and well over 17% were African American. These figures can be compared with the judges nominated by Presidents Reagan and Bush, of whom less than 8% were minorities and only 4% were African American.

The Senate's confirmation record for minorities in 1997–98 is mixed. In 1997, 6 of the 36 judges confirmed (less than 17%) were minorities, and 4 (over 11%) were African American. The Senate's record improved in 1998: of the 64 judges confirmed, 15 (over 23%) were minorities, and 11 (over 17%) were African American. It is worth noting, however, that of the 25 nominees whose nominations had to be withdrawn or whose nominations died at the end of the 105th Congress, 11 were minorities and 7 were African American.

With regard to gender, approximately 29.5% of the President's nominees over the past 6 years have been women; in 1997–98, nearly 26.5% of his nominees were women. In the first 6 years of his tenure in office, President Clinton has already nominated a considerably greater number of female judicial candidates than were nominated by Presidents Reagan and Bush in the combined 12 years of their administrations. In the Senate, 26% of the nominees confirmed over the past 2 years were women.

What has been very troubling in 1997–98, however, is the length of time that minority and female nominees have had to wait for confirmation: an average of 274 days, compared with an average of 192 days for white men.[8] The most disquieting figure is the amount of time minority women were in limbo between nomination and confirmation: an average of 538 days. Finally, with respect to individuals whose nominations lapsed at the end of the Congress, 8 of the 11 nominees who have been waiting the longest were women or minorities—a situation similar to the one that existed at the end of 1997.

2. The Politicization of the Process

> *[C]onsider what our country will be like in the future if we continue to allow the appointment of more anti-Christian and ultra-liberal federal judges, who are appointed for life.*
>
> Urgent alert sent out by The Christian ALERT Network (TCAN), Inc.[9]

The most disturbing characteristic of the process of nominating and confirming judges to the federal bench in 1997–98 has undoubtedly been the prevalence of partisan politics over the need to fill judicial vacancies in a timely fashion with capable and qualified nominees. Conservatives have attempted to slap the label "judicial activist" both on nominees with whom they disagree on certain issues and on sitting judges whose opinions they dislike, often in civil rights cases.[10] The potential end result of all of these efforts, whose proponents seek both to influence the decisions of sitting judges and to prevent the sitting president from filling more seats on the federal bench, is erosion of the principle of judicial independence and the consequent degradation of the quality of justice delivered to the citizens of America, including in civil rights cases.

The assault on Clinton nominees began with a slowdown in the confirmation process in 1996. As this trend continued and even worsened in 1997—in a process that at least one observer called "advice and cement"[11]—Republican Senators Phil Gramm and Slade Gorton launched a procedural attempt to make it harder to confirm judges.[12] Though ultimately unsuccessful, the spirit of their attack lived on. The Senate in 1997 confirmed fewer judges than they had in any year in recent history.[13] Minority and female candidates for the bench seemed to bear disproportionately the brunt of the attacks; when the first session of the 105th Congress concluded at the end of the year, 12 of the 14 nominees who had been in limbo the longest were minorities or women.

Protests about this situation went largely unheeded by the Republican Party until surprise criticism emerged from the desk of Chief Justice William Rehnquist. In his state of the judiciary report for 1997, he noted that the unreasonable delays in confirming judges were leading to a crisis of vacancies on the bench. He noted that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." He continued: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down."[14]

President Clinton began to make the confirmation of federal judges a priority late in 1997. Having likewise been reprimanded by the Chief Justice in his report for failing to make some nominations promptly, the White House in January 1998 announced plans to send large numbers of nominations to the Senate at the beginning of Congress's second session and to follow up with an aggressive campaign to support Presidential nominees and to work to ensure their confirmation.[15] By the end of the month, however, only some of the promised nominations had materialized, and judicial nominations received relatively little attention as attorneys and others in the White House became increasingly occupied with the Lewinsky scandal and related matters.[16]

Stung by the unexpected critiques and the temporary high profile of the issue, Chairman Hatch responded by picking up the overall pace of hearings and committee votes on nominees. The attacks on alleged "judicial activists" continued, however, in the context of an unusually large number of specific nominees who were targeted by the right and whose nominations were dragged out for an inordinate amount of time. Details on some of these nominations will be discussed below.

In spite of consistent efforts on the part of the ranking minority member of the Judiciary Committee, Senator Patrick Leahy of Vermont, to get nominees confirmed, the pace on the Senate floor was another matter. In the absence of vigorous advocacy on behalf of nominees by the White House and in the presence of continued demands by senators like John Ashcroft from Missouri and Religious Right leaders like James Dobson, Senate Majority Leader Lott delayed in bringing many nominees who had been reported out of the Judiciary Committee up for a vote on the Senate floor. Senator Lott repeatedly used his power to hold up presidential appointments—including judicial nominations—in the latter half of the year as a stick to try to persuade the Administration and more moderate senators to agree to his agenda on other issues. At one point, Senator Lott suggested that he would be willing to hold up confirmations to pressure the Administration to supply requested documents regarding the investigation of technology transfers to China.[17] Then he issued an ultimatum refusing to allow the Senate to confirm any judges until significant progress could be made on appropriations bills, even as he decried the Administration's long-term use of temporary appointments for executive branch positions.[18] Eventually, he relented, and several judges were confirmed in early October. Finally, on the last day of the session, Senator Lott allowed 18 judges to be confirmed, thus ensuring a respectable total for the year.

B. Controversial Clinton Nominees

As mentioned earlier, a number of individual nominees felt the brunt of the pressure levied on Clinton's picks for federal judgeships. Many of these nominees were tapped to serve on the courts of the Ninth Circuit, which conservatives contend is already dangerously replete with an abundance of alleged judicial activists.

Five of the more controversial Clinton nominees were eventually confirmed by the end of the 105th Congress. While each of these five individuals became controversial for different, specific reasons, opponents responsible for the long delays leading up to their confirmations all expressed some fear of "liberal" or "activist" judges as a justification for blocking confirmation.

President Clinton first nominated[19] *Margaret Morrow* to serve on the U.S. District Court for the Central District of California on May 9, 1996.[20] Morrow was an established corporate litigator with over 20 years of experience from Los Angeles who had earned an overwhelming number of bipartisan endorsements for her nomination—including that of Chairman Hatch, who sent a letter to his colleagues on her behalf. She was the first woman to head the California Bar Association, she created the Pro Bono Council of the Los Angeles County Bar Association while she served as the Bar Association's President, and she was twice named one of the top 100 Los Angeles business lawyers. Conservatives, however, insisted that her *pro bono* involvement and her membership in the California Women Lawyers indicated that she was a liberal activist. As alleged proof of their charge, they cited a speech in which she had included the following quotation from Justice Brennan: "Justice can only endure and flourish if law and legal institutions are 'engines of change' able to accommodate evolving patterns of life and social interaction in this decade."[21] According to Morrow, she was speaking about the need for bar associations to change in the context of a speech about bar associations and reform. Despite documentation of her explanation, Senators Ashcroft and Sessions and others insisted that she was unfit to serve on the bench. Critics interpreted another comment she had made, in an article offering her concerns about California's ballot-initiative process, as expressing disdain for ballot initiatives in general—again, in spite of evidence to the contrary. Despite approval of her explanation by Chairman Hatch and others on the committee, senators insisted that she reveal to them her *personal* views on all 160 initiatives that had appeared on the ballot over the last decade, although they later relented and significantly reduced the number of such questions she was required to answer. In the end, the overwhelming bipartisan support for her nomination led to her confirmation on February 11, 1998, by a vote of 67 to 28, concluding a wait of 611 days.[22]

President Clinton first nominated *Margaret McKeown* to the Ninth Circuit Court of Appeals on March 29, 1996. The first woman to be named a partner in the Seattle-based law firm of Perkins Coie, McKeown's outstanding career focused on complex commercial litigation and intellectual property. She also devoted substantial amounts of time and energy throughout the course of her legal career to *pro bono* causes and various civic institutions. Among other commendations, she was named "Outstanding Lawyer" by the Seattle-King County Bar Association in 1992. Conservative critics employed several questionable arguments to back up their assertions that she would be a judicial activist on the bench. First, they asserted that she had taken a "leading role" in "grant[ing] special legal status to homosexuals"[23] as a result of her *pro bono* work on behalf of the Washington Association of Churches (performed at the request of her firm) challenging initiatives that would have forbidden the enactment or enforcement of state and local laws prohibiting discrimination against gays and lesbians. Second, they claimed that, in a brief in that case, she had expressed opposition to citizen participation in decision-making, despite the fact that she had made no such argument. Rather, the brief had argued that open political participation is essential to American democracy and that the initiative in question did not meet procedural requirements and was unconstitutional because a single group was excluded from political participation. One critic even went so far as to proclaim that McKeown's distinguished private practice career was merely "good professional cover for her aggressively liberal political activism."[24] Again, however, with bipartisan support that included Democratic Senator Patty Murray and Republican Senator Slade Gorton, both from Washington, as well as former Senator Alan Simpson of Wyoming, McKeown was voted out of committee by a vote of 16 to 2 on February 26, 1998. At that time, even Senator Jeff Sessions stated that perhaps McKeown would be a moderating influence on the Ninth Circuit. The full Senate confirmed McKeown by a vote of 80 to 11 on March 27, 1998. Her wait for confirmation lasted 728 days.

President Clinton first nominated *Susan Oki Mollway* to serve on the U.S. District Court for the District of Hawaii on December 21, 1995. Another accomplished commercial litigator, Mollway was named "Outstanding Woman Lawyer" by the Hawaii Women Lawyers Association in 1987. Senator Sessions led the opposition to Mollway's confirmation, which consisted chiefly of criticism of her *pro bono* work for the Hawaii American Civil Liberties Union and her service on its Board. Opponents claimed that she was a judicial activist because the Board took a position in favor of same-sex marriage while she was a director, despite the fact that the Board had in fact passed that resolution several years prior to the time Mollway became a director. Some observers suggested that some conservative senators were in fact simply applying a virtual anti-ACLU litmus test. Moreover, Mollway was attacked for having "had a long-term active relationship with two women's lawyers groups which litigate and lobby for left-wing causes."[25] The two groups in which Mollway had been active were Hawaii Women Lawyers and the Hawaii Women's Legal Foundation, and the "long-term" relationship lasted approximately two-and-one-half years. Mollway was finally confirmed by the Senate on June 22, 1998, after a wait of 913 days. She is the first Asian American woman to serve on the federal bench.

President Clinton nominated *Sonia Sotomayor* to the U.S. Court of Appeals for the Second Circuit on June 25, 1997. The primary controversy surrounding her nomination was brazenly political: some conservatives feared that if Sotomayor (a sitting judge in the Southern District of New York whom they believed to be too liberal) were confirmed to the appellate court, she would be a likely choice for the next vacant seat on the Supreme Court. The rationale they offered was that President Clinton would feel compelled to appoint a Hispanic to fill the next open seat on the Court, and Sotomayor would be one of the most likely candidates if she were confirmed for the Second Circuit.[26] Sotomayor was eventually confirmed for the Second Circuit on October 2, 1998—464 days after she was nominated.

President Clinton first nominated *William Fletcher* to serve on the Ninth Circuit Court of Appeals on April 25, 1995. A friend of Bill Clinton's and a classmate from the President's Rhodes Scholar days, Fletcher was by all accounts a well-qualified nominee.[27] Nonetheless, conservatives like Senators Ashcroft and Sessions denounced him as a judicial activist, reiterating their concerns that the Ninth Circuit was too liberal and that confirmation of Fletcher to that court would preserve its liberal leanings.[28] Opponents of the nomination then channeled their arguments into a unique theory: invoking an old, little-known, and rarely used statute, they asserted that Fletcher ought to be blocked from serving on the court until his mother, Betty Binns Fletcher, gave up her seat on that same court. A pledge from Betty Binns Fletcher to take senior status once her son was confirmed did little to convince William Fletcher's critics that he ought to be confirmed. Thus began an odyssey of maneuvering and dealmaking. First, President Clinton entered into a highly controversial agreement with Senator Gorton to nominate Barbara Durham, the conservative Chief Justice of the Washington State Supreme Court, to the next available vacancy on the Ninth Circuit Court of Appeals in exchange for Gorton's support of Fletcher. This deal was followed by the linking of Fletcher's nomination to passage of S. 1892, a bill to prevent anyone closely related to a federal court judge from becoming a judge in a court on the same circuit.[29] After gaining approval in the Senate, the bill passed the House on October 7, 1998. Fletcher was confirmed by the Senate by a vote of 57 to 41 the next day, after an astonishing 1,260 days had passed between his original nomination and his confirmation.

Other controversial nominations included some of those which were withdrawn or which died at the end of the 105th Congress. For example, President Clinton nominated *Frederica Massiah-Jackson* to be a U.S. District Judge for the Eastern District of Pennsylvania in July 1997. After her nomination had been favorably reported out of the Judiciary Committee, conservatives and some members of the law enforcement community vocally began to oppose her, stating that she had been soft on crime and tough on law enforcement officers. Critics cited examples of what they believed to be her inappropriate conduct as a Philadelphia judge, including profanity from the bench and one incident where she allegedly ordered undercover agents in her courtroom to identify themselves. After two days of consideration of her nomination on the floor of the Senate in February, her nomination was returned to the Committee for further hearings. The hearings did little to resolve the intense debate regarding her nomination, and she withdrew from consideration on March 16, 1998.

Unwarranted difficulties concerning nominations to the Ninth Circuit surfaced once more in the nominations of *Marsha Berzon* and *Richard Paez* to that appellate court. Berzon, a labor lawyer from San Francisco who received endorsements from both union and management lawyers, as well as from law enforcement and various Republican officials, received a hearing before the Judiciary Committee six months after being nominated in January 1998, but no further action was taken on her nomination, which ultimately died at the end of the Congress. Similarly, Paez, who was first nominated in January 1996 and whose nomination was favorably reported to the Senate in March 1998, never achieved consideration on the Senate floor. Paez, whose supporters included Republican Representative James Rogan of California, witnessed the death of his nomination at the end of the 105th Congress without the opportunity for a full Senate vote—just as he had at the end of the 104th Congress in 1996.

One other nomination that lapsed at the end of the 105th Congress that is notable because of the rarity of political disputes surrounding nominees to the circuit involved is the nomination of *Timothy Dyk* to serve on the Federal Circuit. Dyk, a partner at the Washington, D.C., office of Jones, Day, Reavis & Pogue, was widely expected to sail through the confirmation process following a generally uneventful hearing in the Judiciary Committee in July 1998. An intervening letter from Gary Bauer, the extreme-right leader of the Family Research Council, changed that, however, and other conservative groups began to echo Bauer's cry that Dyk was a liberal activist, primarily as a result of his largely successful legal work on behalf of broadcasters challenging government regulation of so-called "indecent" broadcasting.[30] Although Dyk was not voted on in 1998 despite answers to these charges and bipartisan support, even his opponents and Republican committee staffers seem to think that he will be confirmed if he is renominated in 1999.[31]

C. Other Attacks on the Courts

Conservatives have focused their attentions not only on President Clinton's nominees to the federal bench, but also on those who already sit there. Some of these targets were appointed to their jobs not by President Clinton, but by former Presidents Reagan and Bush. House Majority Whip Tom DeLay has been one of the leaders of the movement to pressure judges into issuing decisions that correspond with conservative philosophies, instigating an effort to impeach judges who issue "wrong" decisions. Representative DeLay's initial targets included Judge Thelton Henderson, the district court judge from California who issued the 1996 injunction blocking the enforcement of Proposition 209 in California, the voter-approved ballot initiative to end California affirmative action programs.[42] Representative DeLay's efforts won approval from other right-wing House members, and observers noted that DeLay's program of attacks on federal judges would improve morale among conservatives frustrated with some House Republicans. This positive response from other conservatives led the Majority Whip to remark, "they think I'm a god on this one."[43] Other conservatives soon followed suit: Representative Bob Barr of Georgia, for instance, complemented Representative DeLay's impeachment calls with his own judicial impeachment agenda: "the mere *threat* of impeachment will have a salutary effect on the federal judiciary."[44] He, Senator Hatch, and numerous others have sought to turn their beliefs into reality by publicly condemning judges and their decisions when they disagree with them.[45]

These attacks on sitting judges and the decisions they issue—particularly in the civil rights arena—are reminiscent of a response years earlier to the 1954 unanimous Supreme Court decision in *Brown v. Board of Education*. Segregationists labeled the Brown decision "judicial activism" and insisted—albeit unsuccessfully—that Congress impeach Earl Warren. Two years after the decision, 100 members of the House and Senate signed a resolution criticizing *Brown*, calling it a "clear abuse of judicial power" that exemplified federal courts' predilection for legislating from the bench and for substituting judges' "personal and social ideas for the established law of the land."[46] These words are almost identical to the ones employed by conservatives charging "judicial activism" today. The modern perspective on *Brown*, of course, is that the Court in that case fulfilled precisely the protective role in our system of government that it was designed to play.[47]

Some members of Congress have also contributed to the pressure on the courts by introducing and working to pass legislation designed to limit the ability of federal courts to issue rulings in areas where conservative legislators have disagreed with courts' rulings in the past. Most notably, some congressional proponents sought to restrict severely the ability of federal courts to rule on the constitutionality of measures passed via statewide referenda. H.R. 1252, the "Judicial Reform Act of 1997," would have required that any constitutional challenge to any such measure would have to be sent to a special three-judge court for resolution, with expedited review directly to the Supreme Court. A version of the bill passed the House, but companion legislation introduced in the Senate was never taken up for consideration.

H.R. 1252's original language also included a provision that would have forbidden district courts from ordering or approving any settlement that would "require" a state or municipality to impose or increase taxes unless six exceptionally stringent criteria were met. Because state or local authorities could argue that virtually any court-ordered remedy whose compliance required significant expenditures would "require" an increase in taxes, federal courts would have been left without an effective means of enforcing statutes passed by Congress. Moreover, the proposal could have precluded courts from ordering such relief when necessary to enforce constitutionally guaranteed civil rights. School desegregation following *Brown v. Board of Education*, for example, would have had a different outcome if H.R. 1252 had been in effect at the time that case was decided; after *Brown*, a number of courts were required to order recalcitrant local school districts to undertake expenditures to desegregate the public schools. Finally, the language of the bill could have invalidated hundreds of desegregation court orders currently in effect. This language was significantly modified before the bill passed the House as a result of such concerns.

III. Analysis: Potential Impact and Outlook for the Future

A. Potential Impact

The increasing politicization of the federal judicial nomination and confirmation process is a dangerous trend. If it continues, it necessarily will have an impact on the quality of the judges placed on the bench and the quality of the justice they dispense.

First, the cries of "judicial activism" as applied to even moderate judges and judicial candidates—as most of President Clinton's recent nominations have been—threaten to develop into a conservative litmus test that anyone who wishes to become a federal judge must pass.[38] In other words, "anyone who doesn't march in lock step to ultra-conservative philosophy will be singled out for criticism,"[39] and anyone who outright disagrees with conservative viewpoints may well not be confirmed. Aside from the obvious detriment of valuing political ideology over jurisprudential talent and experience, this pressure has already had an impact on the Administration, which at times prefers to nominate candidates who may produce a smoother confirmation process over those who may be equally qualified but whose views may engender a bit more controversy.[40] In many instances, even clearly moderate and centrist candidates have nonetheless received such criticism and been subjected to serious delays. Some progressive advocates have already criticized the Administration for shying away from well-qualified nominees with progressive backgrounds.

Second, the recently developed tendency to denounce judicial nominees for their *pro bono* work is truly disturbing. The nominations of Margaret Morrow, Susan Oki Mollway, Margaret McKeown, and several others demonstrate how the services that such distinguished lawyers have found the time to render to their communities even while they maintained busy private practices have come back to haunt them as judicial nominees. As Democratic Senator Russell Feingold of Wisconsin stated during a confirmation hearing on Christina Snyder (who was eventually confirmed to the U.S. District Court for the Northern District of Florida, but was first grilled during her hearing by Senator Sessions regarding her *pro bono* work): "Let me just say that it is kind of an irony when we get to the day where if you don't participate in pro bono activities, you are somehow in a situation where your record is a little safer vis-à-vis being appointed to a federal judgeship."[41] In a profession whose members are often castigated for being too self-serving, it seems ironic that talented individuals who do donate their time and energy to community causes would find that such contributions only hinder their careers. It is easy to see how such a strategy could ultimately have a chilling effect on *pro bono* work. The ultimate losers in such a scenario, of course, would be the recipients of *pro bono* services, who are often minorities and the poorer members of society.[42]

Third, those who purport to harbor concerns about the potential damage "judicial activism" may inflict upon our governmental and societal fabric in fact seek to alter the fundamental role that judicial review plays in our system. The system of checks and balances that characterizes our government ensures that the majority does not always have the final say; rather, the "very purpose of the Bill of Rights and other key parts of the Constitution is to ensure that some violations of precious individual freedoms and some harm to minorities do not occur, even if a majority of people or a state legislature temporarily think they should."[43] A federal judge who strikes a referendum, for example, because he or she determines that it violates some constitutional right generally is not acting in violation of the requirements of the Constitution, but in accordance with them. This principle of judicial review must be preserved, or, as Alexander Hamilton noted in *The Federalist Papers*, "all the reservations of particular rights and privileges [in the Constitution] would amount to nothing."[44]

Finally, what will be the consequences if conservative efforts to keep President Clinton's nominees from the bench and to intimidate sitting judges are effective? Judges risk losing the faith of litigants; as the President of the American Bar Association has explained, "misleading demagoguery, threats and political intimidation distort the public's view of the judicial process, undermine public confidence in the justice system, and have a chilling effect on judges."[45] Judges would compromise their impartiality as well if they were to make decisions based upon political pressures rather than solely on the law and the facts of the cases before them.[46] Justices Anthony M. Kennedy and Stephen G. Breyer recently made this point in an unusual public appearance where they criticized those who attempt to influence judges in an extrajudicial setting. "The law makes a promise," stated Justice Kennedy. "The promise is neutrality. If that promise is broken, the law ceases to exist. All that's left is the dictate of a tyrant, or a mob."[47] In the end, the active campaign against so-called "judicial activism" will benefit neither the judiciary nor the public that it is designed to serve.

B. Outlook for the Future

The course of federal judicial nominations in the last portion of President Clinton's term in office is an uncertain one, subject to many contingencies. While one school of thought may be that the unprecedented bipartisan bickering over the process will continue, another suggests that the surprising elections of November 1998—in which the public seemed to express its frustration with the elevation of partisan politics over good government—will prompt a turnaround and a return to an earlier era of prompt consideration of judicial nominees. In any event, the Administration should refocus its energy on promptly naming candidates to serve on the federal bench as vacancies occur, and then should maintain an active role in supporting its nominees and pushing for their timely consideration by the Senate. This is particularly important with respect to minority and female nominees, who were significantly delayed in 1997–98. In addition, the Administration should resubmit the nominations that were not acted upon by the Senate in 1998 as soon as possible when the Senate convenes again in 1999. In making these nominations, the President should continue to emphasize diversity, and, while of course working with senators to locate qualified candidates from their states, should not restrict nominations only to those who are the least likely to give rise to controversy.

In the 106th Congress, senators should work to improve their mixed record on judges. While it is encouraging that 1998 saw fewer delays and judicial vacancies than did 1997, more prompt consideration of nominations on a consistent basis is imperative. This need is especially great where minority and female nominees—especially minority women—are concerned. The Senate should fully exercise its "advice and consent" function, including questioning or opposing specific nominees when appropriate, but unwarranted delay and unfair opposition to nominees should not occur. Controversial nominees should, after a reasonable period of time, be brought up in committee and on the floor of the Senate for a vote. Moreover, the burgeoning practice of using individual nominations or nominations as a whole as bargaining chips to achieve other political ends must be diminished if the integrity of the process is to be preserved. As we move into the 106th Congress and the final years of the Clinton Administration, all parties concerned should work to establish a bipartisan legacy of contributing to the achievement of the effective and fair dispensation of justice in America.

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Endnotes

[1] Note that all numbers in this article refer only to Article III courts, excluding the U.S. Court of Federal Claims, and do not include nominees to the U.S. Court of International Trade.

[2] William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (1997).

[3] *ABA Journal* (Oct. 1992), at 57.

[4] Ted Gest, "Disorder in the Courts?" *U.S. News & World Report*, Feb. 12, 1996, at 40 (quoting Assistant Attorney General Eleanor Acheson).

[5] There were no Supreme Court vacancies during 1997–98.

[6] See, e.g., "Dole Strafes Clinton Judges, ABA," *Legal Times*, Apr. 22, 1996, at 19; People For the American Way, *Clear and Present Danger: The New Far Right Judicial Litmus Test*, at 7 (Aug. 1996).

[7] Leon Higginbotham, "The Case of the Missing Black Judges," *The New York Times*, July 29, 1992, at A21.

[8] Note that the figures for length of time between nomination and confirmation only include nominations that were ultimately confirmed by the Senate; they do not take into account individuals whose nominations lapsed at the end of the 105th Congress or those whose nominations were withdrawn.

[9] The Christian Alert Network (TCAN), Inc., "Urgent Alert #1: Wake Up America," *http://www.vvm.com/~ctomlin/U1.htm* (retrieved Feb. 19, 1998).

[10] See, e.g., Judiciary Committee News Release, *Remarks of Senator Orrin G. Hatch*, at 4–5 (Jan. 27, 1998) (hereinafter "*Remarks of Senator Hatch*"), wherein Senator Hatch lists numerous judges whose decisions have offended him and who, in his opinion, "refuse to abide by the rule of law and instead attempt to act as legislators."

[11] David Sarasohn, "Senate Turns Advise-and-Consent Role to Advice and Cement," *Newshouse News Service*, Nov. 24, 1997.

[12] Dan Carney, "Looking for Confirmation from His Peers," *CQ Weekly*, Jan. 10, 1998, at 82, 83.

[13] For more information on the 1997 confirmation delays and their impact, see generally People for the American Way, *Judges Delayed, Justice Denied: The Right Wing Attack on the Independent Judiciary* (Sep. 1997) (hereinafter "*PFAW Report 1997*").

[14] Rehnquist, *supra* note 2.

[15] See Thomas B. Edsall, "Clinton Plans Judicial Offensive," *The Washington Post*, Jan. 16, 1998.

[16] See, e.g., Michael Grunwald, "Coming Up Short on an Appeals Circuit," *The Washington Post*, Oct. 6, 1998, at A21.

[17] George Clifford III, "Lott Refuses to Release His Hold on Clinton Nominations," *CQ Daily Monitor*, July 22, 1998, at 5.

[18] *Id.*

[19] The phrase "first nominated" is used in this article to refer to nominees in the 105th Congress who were initially nominated to the same position in the 104th Congress and who were then renominated in the 105th Congress. Where the President's initial nomination of an individual was in the 105th Congress, the word "first" is not employed. In all cases, only the first date of the individual's nomination to the position on the bench in question is used.

[20] One category of controversial nominees seemed to be women whose last names begin with the letter "M": Margaret Morrow, Margaret McKeown, Susan Oki Mollway, and Frederica Massiah-Jackson.

[21] Alliance for Justice, *Margaret Morrow*, at 3 (1998) (citing 1993 speech in which Morrow quoted Justice Brennan).

[22] Note that the first Judiciary Committee vote on Morrow's nomination, which occurred on June 27, 1996, was unanimously in her favor. Even the second vote on June 12, 1997, following criticisms sparked by Thomas Jipping, President of the Free Congress Foundation's Judicial Selection Monitoring Project, was 13 to 5 in her favor. Yet, it took another four months before her nomination was considered on the floor of the Senate.

[23] Judicial Selection Monitoring Project, "Special Report: The Judicial Selection Monitoring Project Leads the Battle for a Restrained Judiciary," *The Judicial Selection Monitor* (Feb./March 1997).

[24] Robert T. Nelson, "Conservatives Make Example of Seattle Lawyer—Past Liberal Activism Haunts Federal Appeals-Court Nominee," *The Seattle Times*, March 24, 1997, at B1 (quoting Tom Jipping, head of the conservative Judicial Selection Monitoring Project).

[25] Judicial Selection Monitoring Project, *supra* note 23.

[26] See, e.g., Paul A. Gigot, "Supreme Politics: Who'd Replace Justice Stevens?," *The Wall Street Journal*, May 29, 1998 ("If liberals do prevail, the president could turn to 43-year-old New York district judge Sonia Sotomayor. She's every Republican's confirmation nightmare—a liberal Hispanic woman put on the district bench by George Bush . . . . Her willingness to legislate from the bench was apparent in her recent decision that a private group giving work experience to the homeless must pay the minimum wage.").

[27] For example, Chairman Hatch repeatedly expressed his support for Fletcher despite his concerns about the Ninth Circuit: "This court is out of the mainstream . . . . It's terrible, it's embarrassing but I just can't translate that into voting against Fletcher." *Congressional Quarterly's Midday Update*, May 21, 1998 (hereinafter "*CQ Midday Update*"). See also Helen Dewar and Joan Biskupic, "Hatch Vows Action on Stalled 9th Circuit Nomination," *The Washington Post*, May 8, 1998, at A6. Moreover, conservative Senator Mike DeWine of Ohio implicitly acknowledged Fletcher's qualifications even as he opposed his confirmation: "I suspect I would vote for this nominee if he were nominated in a different circuit." *CQ Midday Update, supra*.

[28] See Dewar and Biskupic, *supra* note 27.

[29] Note that the bill was not retroactive, and therefore would not have affected the Fletcher nomination.

[30] Letter from Gary L. Bauer, President, Family Research Council, to the Honorable Orrin G. Hatch (July 29, 1998).

[31] See Robert Schmidt, "Fire Over . . . the Federal Circuit?," *Legal Times*, Sep. 7, 1998; "Inadmissible," *Legal Times*, Oct. 26, 1998.

[32] *PFAW Report 1997*, *supra* note 13, at 5–6.

[33] *Id.* at 6.

[34] National Legal Foundation and Minuteman Institute, *Impeachment of the Federal Judiciary: Why the "Romer 6" Must Go*, at 19 (1996).

[35] See Max Boot, "America's Worst Judges," *The Wall Street Journal*, May 26, 1998, at A22; *Remarks of Senator Hatch*, *supra* note 10.

[36] *PFAW Report 1997*, *supra* note 13, at 15 (quoting 102 *Congressional Record* 4, 515–16 (1956)).

[37] *Id.*

[38] For comments on the "centrism" of Clinton's appointees, see Anthony Lewis, "Moving the Judges," *The New York Times*, Apr. 27, 1998, at A19; James Bennet, "225 Clinton Nominees Wait for Unlikely Senate Approval," *The New York Times on the Web*, Oct. 9, 1998; "A Good Year for Judges," *The Washington Post*, Oct. 26, 1998 (editorial explaining how the centrist position of Clinton's nominees is a positive development).

[39] Schmidt, *supra* note 31 (quoting Stephan Kline, Legislative Counsel, Alliance for Justice).

[40] See, e.g., "A Good Year for Judges," *supra* note 38.

[41] Robert Schmidt, "Volunteering for Trouble," *Legal Times*, Nov. 10, 1997, at 1 (quoting Senator Feingold).

[42] Some have suggested that work on behalf of certain causes justifies exploration of the possibility of bias on the part of the nominee being considered. However, while it is certainly legitimate to conduct a fair and

prompt examination of the work of individuals who have a history of work on behalf of one cause or series of causes, two points must be remembered. First, lawyers often fulfill their *pro bono* obligations by exploring different areas of the law that are not open to them in their everyday jobs. Such diversity encourages enthusiasm and dedication to cases for which busy lawyers are not getting paid, and helps to ensure that many different *pro bono* causes receive the legal assistance that they require. Second, any good lawyer is a zealous advocate for his or her clients, whether he or she is a liberal, moderate, or conservative and regardless of whether he or she is working for pay or *pro bono*. The default conclusion regarding a candidate's judicial temperament should not be that a nominee who has, in the course of his or her career, strongly advocated a cause that someone else opposes necessarily lacks the capacity to serve as a nonpartisan advocate once he or she is seated on the federal bench.

[43] *PFAW Report 1997*, *supra* note 13, at 14.

[44] *Id.* (quoting Alexander Hamilton, *The Federalist No. 78*).

[45] Jerome J. Shestack, "President's Message," *ABA Journal*, June 1998, at 8; see also *PFAW Report 1997*, *supra* note 13, at 15.

[46] Conservative activist David Barton has suggested that the mere threat of impeachment not only would produce "results," but may in fact have contributed to Judge Henderson's reversal of his earlier decision regarding Proposition 209. *PFAW Report 1997*, *supra* note 13, at 14; see also *supra* note 32 and accompanying text. For similar concerns expressed by a sitting federal judge regarding the potential impact of attacks on sitting judges, see Juan R. Torruella, "On the Subject of Judicial Independence," *The Federal Lawyer* (Nov./Dec. 1997), at 48, 50 (text of speech given by the Chief Judge of the First Circuit Court of Appeals).

[47] Joan Biskupic, "In Rare Appearance, 2 Justices Concur Against Threats to Neutrality," *The Washington Post*, Dec. 6, 1998, at A2.

Chapter VII

The Performance of the U.S. Commission on Civil Rights

by Michael J. Kelleher and Michael L. Walker

Introduction

The United States Commission on Civil Rights (the "Commission") is an independent, bipartisan, fact-finding agency of the Executive Branch, first established by Congress under the Civil Rights Act of 1957. Congress re-established the Commission under the Civil Rights Act of 1983.

Under its statutory mandate, the Commission is chartered to: (1) investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; (2) collect and study information relating to discrimination or a denial of equal protection of the laws under the Constitution; (3) appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws; (4) serve as a national clearinghouse for information with respect to discrimination or denial of equal protection of the laws; (5) submit reports, findings and recommendations to the President and Congress; and (6) prepare public service announcements and advertising campaigns to discourage discrimination and denials of equal protection of the laws under the Constitution.[1]

The Commission does not advocate, litigate, mediate, or enforce laws. According to Chairperson Mary Frances Berry, the Commission is an "independent Federal agency whose primary mission is to illuminate, through careful and objective fact-finding, ways of strengthening civil rights for all Americans."[2] Unlike private organizations, the Commission possesses special investigative powers, including the power to hold hearings and issue subpoenas for the production of documents and the attendance of witnesses at such hearings. Since the Commission lacks enforcement powers that would enable it to apply specific remedies in individual cases, it refers complaints to the appropriate federal, state, or local government agency or private organization for action. The Commission also maintains State Advisory Committees (SACs) in each state and the District of Columbia to monitor civil rights issues.

I. History

During the 1960s and 1970s, the Commission played an active role in shaping America's civil rights agenda. Both policymakers and courts relied on and cited to Commission reports and recommendations.[3] However, the Reagan Administration effectively emasculated the Commission with its appointments: the Commission was accused of mismanagement, spending irregularities, and inaction due in large part to the polarizing effect of the Reagan appointees. Rather than dissolve the Commission, the Bush Administration and Congress attempted to give the agency an opportunity to restore its image and justify its continued existence.

The Commission addressed many substantive items during the Clinton Administration's first term. In particular, the Commission was especially responsive in examining and addressing the burning of African American churches in six southern states. However, the Commission was plagued during Clinton's first term by controversies involving voting irregularities, challenges to the Commission's subpoena power, and delays in the issuance of its enforcement reports. Many of these controversies suggested a problem with the Commission's procedures, as well as a failure by some of the Commissioners to actively participate in the agency's work.[4]

The Commission has responded to many of the administrative problems that led to the controversies during Clinton's first term. However, the recent criticisms of the Commission's management, outlined in the July 1997 Report by the U.S. General Accounting Office (GAO) (discussed in Section IV), made several points that led opponents of the Commission to call for a decrease in the Commission's budget, or even for the Commission's dissolution.[5] Many Commission supporters also agreed with the criticisms contained in the GAO Report. The Commission has spent the past year implementing the GAO-recommended reforms and continuing to pursue its civil rights mission. Given its limited funding, and particularly in the context of the work of previous Commissions, the Commission's overall performance has been extraordinary. Monitoring civil rights complaints, taking immediate actions in response to civil rights crises, and providing a forum for the discussion of civil rights are the goals of the Commission. However, the Commission cannot make a lasting impact on civil rights without adequate funding from Congress (see Section VIII, Recommendations).

II. The Commission During the Clinton Administration

A. Appointments of the Commissioners

The Commission consists of eight Commissioners and one Staff Director. The Commissioners are appointed for six-year terms. Four of the commissioners are appointed by the President, and four are appointed by Congress. The President Pro Tempore of the Senate and the Speaker of the House each appoint two Commissioners. The President also appoints the Commission's Chairperson, Vice-Chairperson, and Staff Director, with majority approval of the Commissioners. Although no Senate confirmation is required for the appointment of the Commissioners or Staff Director, the President reserves the power to remove a member of the Commission for neglect of duty or malfeasance in office.[6] By statute, only four Commissioners may be affiliated with any one political party.

Serving on a part-time basis, the Commissioners hold monthly meetings and convene several times a year to conduct hearings, conferences, consultations, and briefings. The current Commissioners include Chairperson Mary Frances Berry (Independent), Vice-Chairperson Cruz Reynoso (Democrat), Carl A. Anderson (Republican), Robert George (Independent), Leon Higginbotham, Jr. (Democrat), Constance Horner (Republican), Yvonne Y. Lee (Democrat), and Russell Redenbaugh (Independent).[7] The terms of Commissioners Constance Horner and Robert George, both appointed by President Bush in 1993, will expire in December 1998. President Clinton's appointment decisions will undoubtedly have an impact on the group's cohesiveness and ability to make future decisions.

The Commission has been plagued at times by division along political party lines. Some Commissioners have justified their voting stances on the grounds that they are required to provide politically motivated balance in the coverage of various issues contained in SAC reports issued by the Commission. The recurring theme of balance and partisan politics continues to foster an unproductive environment at the Commission.

B. Appointment of the Staff Director

Unlike the Commissioners, the Staff Director serves in a full-time capacity. The role of Staff Director is vital in ensuring that the everyday operations and functions of the Commission are taking place. The Staff Director is responsible for maintaining proper communication and coordination of information and activities between Commissioners, Commission staff, and the Regional Offices that oversee the State Advisory Committees.

There has been a history of controversy concerning the appointment of the current and past Commission Staff Directors. In an effort to permanently fill the position, President Clinton nominated Ruby G. Moy in June 1997. Despite the concerns voiced about Moy's nomination, and in the face of the promotion of an alternate nominee by one of the largest Asian Pacific American civil rights organizations,[8] the eight Commissioners unanimously approved the Presidential nominee.[9] Since her appointment, Moy has made her presence felt by implementing an open door policy with her staff and advocating the Commission's viability. A month after accepting the position as Staff Director, Moy wrote a rebuttal to former Staff Director Linda Chavez's August 3, 1997, article suggesting that the Commission had outlived its usefulness.[10] Since Moy has served as Staff Director for only a year, it is not yet clear what kind of impact she will have on the management problems of the Commission. Surely her strongest test as Staff Director will be in meeting the GAO's requirements and making future budget requests.

III. Commission Accomplishments During the Clinton Administration Since 1996

Despite the Commission's problems, its overall output since September 1996 has been very impressive. The Commission has made a great effort in preparing and issuing enforcement reports, convening hearings, forums, and consultations on timely issues and civil rights crises, educating the public through public service announcements, serving as a resource for the nation's civil rights complaints, and producing numerous hearings and reports at the State Advisory Committee level. Its output is especially impressive considering that its funding, adjusted for inflation, has declined by about 58% since FY1980.[11]

A. Statements, Resolutions and Briefings

Since September 1996, the Commission has issued public statements and resolutions: (1) urging Congress to enforce the anti-discrimination provisions of the Welfare Reform Law (1996); (2) commending the leadership of South Carolina Governor David Beasley who called for the removal of the Confederate flag from the state capital (1996); (3) praising the President's Race Initiative (1997); (4) warning against scapegoating Asian Pacific Americans during the campaign fund-raising controversy (1997); and (5) proposing an increase in civil rights enforcement funding (1998).[12]

Public briefings are another powerful tool of the Commission. As part of its congressional mandate, the Commission has heard from a variety of experts on emerging civil rights issues that are not part of its investigative and monitoring programs. These briefings have also helped to provide a forum for citizens to discuss civil rights problems.

One briefing, described by Chairperson Berry as one of the most important accomplishments of the Commission over the past two years, was held in December 1997 in response to a petition filed with the Commission by a group of Asian Pacific Americans as a result of the campaign finance investigations. More specifically, the petition charged that the federal campaign investigations had unduly focused on Asian Pacific Americans and tainted the entire Asian American community, prompting some to question the loyalties of U.S. citizens who are of Asian descent.[13] Disparaging comments made by members of Congress about Mr. Huang (and other Asian Americans under investigation) included Representative Jack Kingston's (R-GA) statement that referred to illegal donations as "only the tip of the egg roll."[14] In addition, the media coverage surrounding the investigation exhibited racially inflammatory reporting, such as Newsweek's story featuring the "Mysterious Asian-Americans."[15] The Commission held a briefing which consisted of three panels of speakers addressing Democratic National Committee policies, the media, political participation, and stereotyping. Witnesses included donors who felt wronged by the controversy, academics who discussed the historical root of anti-Asian American bias, and journalists who discussed the media reporting. The Commission issued a report on this briefing in October 1998 containing a summary, background paper, and transcript of the December 1997 briefing.[16] The Commission's work appears to have had some impact because these types of racially inflammatory charges by some members of Congress and the media seemed to have subsided after this timely briefing.

In addition to this briefing, the Commission held briefings on the following issues: (1) reviewing immigrant and civil rights issues presented by recent welfare reforms (December 1996); (2) examining whether cuts and restrictions in legal services and the Legal Services Corporation would affect access by the poor to the legal system (May 1997); (3) addressing the impact of government regulations affecting minority business enterprises (1997); (4) exploring public schools and religious rights and freedoms in the Pacific Northwest (following up hearings in Washington, D.C., and New York) (August 1998); and (5) examining U.S. progress in its treaty obligations under international human rights law and how international law can be used to further the cause of domestic civil rights issues (October 1998).[17]

B. A Clearinghouse for Civil Rights Complaints

In addition to holding briefings, the Commission has been a clearinghouse for citizens' allegations of civil rights abuses. The Commission received more than 15,000 written and telephonic complaints from January 1996 through September 1998 from individuals alleging a wide variety of civil rights abuses.[18] The Commission refers approximately 75% of the complaints received to the appropriate government or private organizations for action, while the other 25% of complaints received either are outside the Commission's jurisdiction or do not relate to civil rights.[19]

C. Civil Rights Publications, Public Service Announcements, and Web Page

As part of the Civil Rights Act of 1964, the Commission was chartered to provide information on civil rights matters to national and community organizations, government agencies, and the public. To fulfil this responsibility, the Commission issues publications to increase understanding about civil rights problems as well as the laws and approaches available for resolving them.[20] For example, the Commission published *The Civil Rights Journal*, a magazine containing articles from various respected civil rights authorities, in 1995 and 1997.[21] Volume Three of *The Civil Rights Journal*, to be published by December 1998, will address such topics as New York State's efforts to stop the refusal of goods and services to minorities in low-income neighborhoods and the response by Congress to overcrowded prisons.[22] Interestingly, these editions of *The Civil Rights Journal* were not available on the Commission's web page nor could we find any information about them in the news media. Without proper marketing, the impact of the Commission's publications function is limited. In addition to releasing *The Civil Rights Journal*, in March 1997, the Commission issued a revised booklet entitled *Getting Uncle Sam to Enforce Your Civil Rights*, explaining where and how to file a complaint or report a violation of federal civil rights laws.[23] This booklet also provides examples of organizations that might help to combat civil rights violations.

In 1998, the Commission distributed and aired its second radio public service announcement (PSA) designed to combat and discourage discrimination and intolerance. The new PSA, entitled *Teach the Children*, was recorded by television stars Phylicia Rashad and Eriq LaSalle. In the words of the PSA, parents should: "Teach tolerance. Because open minds open doors for all our children."[24] The PSA has been distributed in 30- and 60-second versions to more than 4,000 radio stations in every state. The Commission can only hope that its second PSA receives the exposure and leads to the same results as its first PSA, *Discrimination, Just Out of Tune with*

America, recorded by Mary Chapin Carpenter. According to Chairperson Mary Frances Berry, "the cost to the Commission for developing and distributing (Mary Chapin Carpenter's) message was relatively small and, based on a very high station response rate, the air time has been estimated to be worth at least $1,000,000." In Chairperson Berry's view, "The success of this PSA is also indicated by a marked increase in the number of civil rights complaints the Commission received each month after the PSA aired."[25]

Finally, the Commission has continued to provide information to the public and to civil rights agencies and organizations through its home page (located at *http://www.usccr.gov*), which it launched in August 1996. This Internet site contains information on the Commission (including Commissioners' duties, powers, and biographical facts), news releases, and meeting calendars for both the Commission and the SACs. The site also offers instructions on submitting a civil rights complaint to the Commission. To improve the effectiveness of the Internet site, the Commission must update the home page more frequently (the last Commission hearing listed took place in 1992).[26] Easier public access to the Commission's accomplishments might quiet some of the Commission's critics. In this way, the Commission could allow the public to obtain its important publications online, as well as learn of the Commission's accomplishments in a more timely fashion, especially given the vocal opponents to the Commission's authority.

D. Hearings

The Commission is unique in its ability to hold public hearings and in its authority to subpoena testimony of witnesses to investigate civil rights issues and provide recommendations for solutions. The Commission has held a number of hearings since September 1996, despite limited resources.[27]

The Commission has continued to pursue a project undertaken in 1991, entitled *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination* ("Ethnic Tensions Project"). Hearings in connection with this project have been held in New York City, Miami, Washington, D.C., and Chicago, and, most recently, in Los Angeles (September 1996) and the Mississippi Delta Region (March 1997). In Los Angeles, the Commission brought together representatives from the police department (including Chief Willie Wilson), local government (including Mayor Riordan), advocacy groups, academia, the Department of Justice, and the public to discuss instances of and efforts against racial and gender bias exhibited by the L.A. Police Department; the tracking of problem officers; and efforts to sensitize the Department's staff to different cultures.[28] The Commission issued its report summarizing the Los Angeles hearing in September 1998. In Mississippi, the Commission held hearings examining race, the public education system, the economy of the region, problems faced by black farmers, and voting rights in the Delta.[29] The work in this region is particularly important because the Commission's last hearing in Mississippi was in 1965, and the last hearing in any other state in the Deep South was in 1968.[30] The Commission will write a final hearing report containing findings and recommendations for local, state, or federal actions to deal with problems identified during the Los Angeles and Mississippi hearings, and describe broader recommendations for national actions by Congress and the President.[31]

In addition to the Ethnic Tensions Project, the Commission held public hearings in Washington, D.C., New York, and Seattle in 1998 on the topic of "Schools and Religion: A National Perspective."[32] These hearings were designed to examine current issues and disputes regarding public schools and religious rights and freedoms, including such issues as whether schools were disrupting students' and teachers' rights to freedom of religion and freedom of speech, and the role of religion in public school curricula.[33] Various witnesses were subpoenaed to testify under oath at each hearing location.[34] In opening the first of these hearings, Chairperson Berry stated: "We are concerned with those acts which deprive individuals of certain rights because of their religious beliefs and practices."[35] Finally, at the time this chapter was written, the Commission had scheduled hearings on the Americans with Disabilities Act (November 1998), as well as a consultation on the crisis of young African American males in urban cities (December 1998).[36]

E. Reports

The Commission has continued to meet its statutory responsibility for monitoring and evaluating federal civil rights enforcement through its issuance of reports. These enforcement reports "are used by the President to set policy, by Congress to write legislation, by courts to write facts, by other agencies to craft guidelines, by interest groups to study laws and by private citizens to seek justice."[37] Federal agencies are required by law to cooperate with the Commission's fact-finding activities. At one point in its history, the Commission issued enforcement reports on the civil rights record of each federal agency. These reports permitted each agency to evaluate its progress and make necessary changes.[38] Due to inadequate funding, the Commission has had to concentrate its recent efforts on only a few agencies. Despite the narrower focus, the Commission has done an excellent job producing these voluminous reports.[39]

Past Commission reports have influenced civil rights policies in several important ways. For example, several federal agencies have responded to the Commission's findings and recommendations contained in its 1996 report entitled *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (*"Title VI Report"*). The Department of Agriculture "relied heavily" on the 1996 Commission report to reorganize its civil rights operations in response to the Commission's criticisms about agency discrimination against black farmers, which began as early as 1965.[40] The Department of Justice also made a number of changes to its Title VI enforcement efforts in response to the Commission's *Title VI Report*, including reorganizing its Civil Rights Division to provide more resources for its Title VI enforcement activities; resuming publication of the *Civil Rights Forum*; developing a training module on Title VI; expanding its public outreach by installing a telephone hotline; and creating a PSA informing the public on how to exercise its rights under Title VI.[41]

Set forth below is a brief summary of some of the other reports released by the Commission since October 1996:

- *Volume One of Equal Educational Opportunity in America's Public Elementary and Secondary Schools.* Volume One of this planned six-part study examines programs for students with mental, learning, and behavioral disabilities; students with limited English skills; and equal access for female students to advanced math and sciences. According to Chairperson Berry: "By strengthening civil rights enforcement in education, we can assure that efforts to provide a quality education for all children truly include all of our children."[42] Volume One provides background on the study as well as an analysis of and recommendations for civil rights enforcement by the Department of Education (DOE) and its Office for Civil Rights (OCR). (December 1996).[43]

- *Equal Educational Opportunity and Nondiscrimination for Students with Mental Retardation, Learning Disabilities, Behavior Disabilities or Serious Emotional Disturbance: Federal Enforcement of Section 504*. Volume Two of the *Equal Educational Opportunity* series examines and provides recommendations for the enforcement of section 504 of the Rehabilitation Act as well as Title II of the Americans with Disabilities Act (ADA). Although the report contends that students with disabilities are provided broad protections, it concedes that more accurate identification methods not only would protect minorities against discrimination but would help ensure that all students receive appropriate education in public school. (September 1997).[44]

- *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols*. Volume Three of the *Equal Educational Opportunity* series monitors and provides recommendations for the enforcement of protections for students whose English-language ability is limited. The report states: "With high rates of immigration unlikely to lessen in the near future, the urgency of assuring this growing minority of American children that they have equal access to the Nation's educational system likely will continue unabated into the next century." (January 1998).[45]

- *Helping Employers Comply with the Americans with Disabilities Act—An Assessment of How the United States Equal Employment Opportunity Commission Is Enforcing Title I.* This report examines how the EEOC is enforcing Title I. It praises the agency for processing a growing number of discrimination complaints despite a declining budget and encourages it to develop policy documents that address controversial disability issues, such as undue hardship. (October 1998).[46]
- *Helping State and Local Governments Comply with the Americans with Disabilities Act—An Assessment of How the United States Department of Justice is Enforcing Title II, Subpart A.* This report examines how the Department of Justice is enforcing Title II. It praises its outreach and education programs but provides recommendations for its ADA complaint workload and monitoring work. (October 1998).[47]

The GAO review conducted during the Clinton Administration's first term criticized the Commission for lengthy delays in the release of its hearing and enforcement reports.[48] (For example, the 1992 report on the Ethnic Tensions Project in Washington, D.C., was not released until September 1996.) The Commission has narrowed the scope and number of hearings in order to expedite the release of reports. Chairperson Berry and Staff Director Moy have also provided Congress with more realistic expectations in this area.[49] As Staff Director Moy herself noted: "We have also reduced the number of projects undertaken due to lack of funds and reduced staffing."[50]

IV. Controversies

A. U.S. General Accounting Office Report

In July 1997, the GAO released a report to Congress reviewing the Commission's performance and making recommendations for improvement. In preparing its report, the GAO reviewed Commission records, attended several Commission meetings, and interviewed the current Commissioners, the Staff Director, and Commission officials responsible for budgeting and personnel projects. The GAO also reviewed the process for managing projects the Commission initiated or completed during FY1993 through FY1996, a total of 22 projects (5 were completed, 7 were ongoing, and 10 were deferred).[51]

The GAO concluded that "the Commission appears to be an agency in disarray, with limited awareness of how its resources are used."[52] The GAO Report detailed the following concerns:

> *Commission could not provide key cost information for individual aspects of its operations such as its regional offices, clearinghouse activities, complaints' referral process, and public service announcements; nor has the Commission ever requested audits of its operations.*
>
> *Commission has not established accountability for resources and does not maintain appropriate documentation of agency operations, including not having an updated depiction of organizational structure (last updated in 1985) or administrative manual (last updated in May 1975).*
>
> *Commission's guidance for carrying out projects is outdated, including specifying anticipated costs, completion dates and staffing. Seven of twelve projects had no specific proposals showing their estimated time frames, costs, staffing or completion dates.*
>
> *Overall projects took too long time to complete, generally four years or more; projects' delayed*

completion resulted in them being out of date and lessening the effectiveness of the work.[33]

Despite the many criticisms, the GAO did not find any administrative or management improprieties, and made the following recommendations:

1. *Update agency regulations on the organizational structure, procedures and program processes of the Commission;*

2. *Update internal management guidance to ensure that the staff's efforts comply with the administrative policies of the Commission, applicable legislation, federal rules and regulations;*

3. *Establish a management information system for Commissioners and Staff to use to plan and track projects, expected and actual costs, time frames and completion dates.*[34]

Many of the Commission's critics have pointed to the GAO's conclusion that the Commission appears to be an agency in disarray. Four of the eight Commissioners submitted a letter to Congress upon the release of the GAO Report that concurred with the GAO assessment and noted they would "be monitoring closely . . . the implementation of the report's recommendations."[35] While not naming any specific Commissioners, the GAO Report also noted that "some commissioners said that communication is a big problem at the Commission and that improvement in this area up and down staff levels could help resolve the problem."[36]

Various congressional members seized upon the negative conclusions of the GAO Report. Representative Bob Barr (R-GA) told the House Judiciary Committee: "What we see here is an agency utterly incapable of carrying out its lawful mission."[37] Most important, when the Commission's appropriation for FY1999 (through mid-June) was set, the Conference Agreement alluded to the GAO Report as one of the reasons for the decision not to increase the Commission budget by more than an insignificant amount (see below).[38]

On the other side, Chairperson Berry has pointed out several issues for those reviewing the GAO Report to consider. First, cutbacks in the Commission budget have been drastic and clearly taken "an immeasurable toll on staff effectiveness and morale," management, and the overall output. Between 1980 and 1986, the Commission budget ranged from $11 million to $13 million. Since FY1980, the Commission's funding has declined by about 60%. In 1997, the Commission consisted of 90 employees and 6 regional offices, representing only 35% of the workforce and 60% of the offices compared to 1983. Second, Berry noted that the bipartisan nature of the Commission, the Commissioners' part-time status, and their limited supervisory powers had all contributed to delays in the release of reports and the Commission's ineffectiveness. Because the Commissioners are often divided along political lines, the Commission staff must undergo the difficult process of preparing multiple drafts of reports to achieve consensus. Because Commissioners serve on a part-time basis, they do not directly supervise the staff, attend staff meetings, write administrative instructions, or update regulations. In the end, Commissioners defer responsibility to the Staff Director.[39]

It is clear that the Commission must respond to the recommendations cited in the GAO Report. Congress will monitor the Commission's reforms and likely base its funding decisions on measured progress. In addition to Congress, the media and the nation as a whole are very concerned about alleged government waste. Any appearance of "disarray" must be immediately addressed.

In response to the GAO's recommendations, the Commission has taken the following actions:

- Responding to a request for the Commission to update agency regulations on organizational structure, the Commissioners approved new regulations at the September 1998 Commission meeting and they were forwarded to the Office of Management and Budget for public review and comment in October 1998.

- Responding to a request for an updated internal management guidance, the Commission's task force on Administrative Instructions (AI's) completed its revisions to the Commission's AIs. As of November 16, 1998, the AIs "are now being prepared for Union review." Upon union approval, and resolution of all comments, the AIs will be issued to the entire staff for implementation. Review and implementation "should be completed by mid-December 1998."

- Responding to a request to establish a management information system for planning and tracking projects, the Commission has implemented a new Management Information System that will allow for monthly project status reporting for managers and Commissioners."[60]

In addition to the above reforms, Chairperson Berry and the Staff Director's Office have attempted to speed up the process of releasing reports, including reducing the number of projects undertaken due to lack of funds and reduced staffing.[61] Staff Director Moy has instituted many administrative and personnel reforms in response to a November 1996 Report by the Office of Personnel Management (OPM).. The Staff Director recently cited 12 specific steps that have been implemented in reaction to this OPM Report.[62]

Its critics notwithstanding, the Commission has done excellent work since September 1996 (especially in light of its poor output between 1983 and 1991). With a needed "house cleaning," there is no reason why an independent agency for civil rights should not be utilized and praised for its good works. If the recommendations of the GAO are properly addressed, the Commission should be rewarded with funding that can be directed toward specific projects. As Representative Sheila Jackson-Lee (D-TX) has stated: "We cannot allow administrative problems to overshadow the substantive good work accomplished by the Commission on Civil Rights."[63]

B. President's Initiative on Race

Commission critics have viewed President Clinton's appointment of a special advisory commission to investigate racial bias in this country (the "Initiative on Race"), rather than relying on the U.S. Commission on Civil Rights, as a statement on the U.S. Commission's abilities. Representative Charles Canady (R-FL), the chairperson who oversaw the GAO Report, noted that: "The need for the formation of an entirely new advisory board casts great doubt on the efficacy of an existing Commission that purports to address the same issues as the new board." He also stated: "I would also welcome any explanation as to why the taxpayers will be paying for the same product twice."[64] In fact, more moderate congressional members have agreed, including former Senator Paul Simon (D-IL), who stated that: "It is significant that when the President decided to do something on race relations, he appointed a special commission. In previous years, it would have gone to the Civil Rights Commission."[65]

However, upon review, it seems that the criticisms are not justified. First, as the Special Counsel to the President on Civil Rights has suggested, the President's Initiative on Race was a "special effort to promote dialogue."[66] Second, the Commission on Civil Rights is bipartisan, with differing views on racial policies, unlike the President's advisory board, whose members agreed on such matters as affirmative action.[67] In fact, the *Washington Times* quoted White House officials on the appointments to the Initiative on Race Council as looking "for people who were 'on the same wavelength.'"[68] The President's advisory board was also more closely identified with the President, similar to other short-term advisory commissions created by Presidents in the past. By contrast, the Commission is an independent agency "not designed to be the President's personal advisor on any subject."[69] Finally, unlike the President's advisory commission, the U.S. Commission has subpoena power and investigates discrimination with a broader mandate than just race (including national origin, age, gender, sexual orientation, physical disability, and emotional or economic disadvantages).

V. State Advisory Committees

The Commission funds six regional offices that support the State Advisory Committees (SACs) in conducting hearings and preparing reports.[70] The Regional Offices, which are usually comprised of only three paid staff members per region, are responsible for handling complaints while serving as the communication link between the SACs and the national office. The SACs serve as the "eyes and ears" of the Commission in communities across America.[71] They include local volunteer officials who are familiar with local and state civil rights issues.[72] These officials assist the Commission with its fact-finding, investigative, and information dissemination functions. The term of office for an individual member of the SAC is two years with reappointment options. Potential members of the SACs are recommended by the Regional Directors, who submit the recommendations to the Office of the Staff Director. The recommendations are then turned over to the Commissioners, who actually approve the SAC members.[73]

The overall viability of the Commission is clearly demonstrated by the output of work by the SACs and the diverse civil rights issues they seek to address through their projects. The SACs conduct fact-finding meetings and prepare reports on a wide range of topics, such as affirmative action, enforcement of Title VI, police and community relations, federal immigration law enforcement, and hate crimes.[74]

The SACs respond to community issues by holding fact-finding forums and investigative hearings. In addition to providing opportunities for experts to present and summarize their position papers, these hearings and forums provide an opportunity for the public to speak out on particular issues. Recently, in response to Congress's request, the Commission asked the State Advisory Committees of Arizona, California, New Mexico, and Texas to hold hearings on border-related civil rights complaints.[75] Relying on the results of hearings held in 1992 and 1993, as well as testimony and reports by each of the SACs over several years, the Commission, in conjunction with the SACs, released a report in 1996 entitled *Federal Immigration Law Enforcement in the Southwest: Civil Rights Impacts on Border*. This report called for Congress to set up an independent watchdog group to investigate allegations of violence by Border Patrol agents and to establish a process for individuals to lodge complaints.[76] While the Immigration and Naturalization Service and the Justice Department each criticized the report for not acknowledging their improvements in civil rights enforcement, both agencies gave credit to the Commission and the SACs for focusing attention on problems leading to the initiation of corrective actions.[77]

Some of the SACs' other recent hearings and forums include the following: (1) a Mississippi hearing examining race and the public education system, race and the economy, black farmers, and voting rights; (2) a forum in Fort Collins, Colorado, addressing issues of ethnic diversity, race relations, and equal opportunity; (3) a fact-finding forum by the Maine SAC in Fort Kent to discuss the experiences of Maine students with limited proficiency in English; (4) a Maryland SAC civil rights forum on Korean American store owners in Baltimore, addressing issues of equal access to city services, police protection, and the justice system.[78] (See endnotes for SAC hearings and forums conducted since 1996.)[79]

In addition to conducting hearings and forums, the SACs issue reports on various civil rights issues. The Michigan SAC's August 13, 1998, report, *Community Forum on Race Relations in Grand Rapids*, is a praiseworthy example of how an SAC report can affect a community and encourage a dialogue on civil rights issues. The report was a summary of a public hearing conducted on June 25, 1997, concerning the status of race relations in the city of Grand Rapids. The findings of the report addressed a variety of racial and ethnic issues, including problems with housing discrimination against minorities; testimony from a fair housing center revealing 44% of 300 fair housing cases "showed race or other variables played a part"; and an alarming 60% high school dropout rate in Grand Rapids.[80] The release of the report generated strong interest among community members and organizations. As a direct result of the report, a monthly radio talk show has begun broadcasting on public radio.

The co-hosts of the show include the Mayor of Grand Rapids, the Chief of Police of the Grand Rapids Police Department, and the president of the Grand Rapids Urban League, all of whom engage in discussion of various civil rights issues with callers.[81]

Since 1996, the State Advisory Committees have issued the following reports: (1) *Community Forum on Race Relations in Grand Rapids, Michigan*; (2) *Residential Mortgage Lending Disparities in Washington, D.C.*; (3) *Focus on Affirmative Action in Minnesota*; (4) *Race Relations in Rural Western Kansas Towns*; (5) *Wisconsin Consultation: Focus on Affirmative Action*; (6) *The Hmong in Green Bay: Refugees in a New Land*; (7) *Civic Crisis and Civic Challenge . . . Police-Community Relations in Jackson, Mississippi*; (8) *Ohio Consultation: Focus on Affirmative Action*; (9) *Bias and Bigotry in Kentucky*; (10) *Dealing with the Disproportionality in the Juvenile Justice System: The State of Washington's Approach*; (11) *Federal Immigration Law Enforcement in the Southwest: Civil Rights Impact on Border Communities,* issued by SACs from Arizona, California, New Mexico, and Texas; (12) *Race Relations in St. Petersburg, Florida*; (13) *The Impact of the* City of Richmond v. J.A. Croson *Decision Upon Minority and Female Business Programs in Selected Ohio Cities*; and (14) *Burning of African American Churches and Perceptions of Race Relations,* issued by SACs from Alabama, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.[82]

Controversies have erupted over the release of some SAC reports. Under Commission policy, all SAC reports must be reviewed by the Commissioners, who then vote on whether to publicly release the reports. If a majority is not reached by the Commissioners, then the SAC is required to resubmit the reports with revisions within two months. If all procedural rules are followed and if the SAC has included a variety of perspectives, then the Commission will accept and issue the SAC report. The report is then made readily available to the public and sent to the Library of Congress. However, controversy and gridlock often ensue and unfortunately contribute to delays in the release of reports and, occasionally, to the ultimate rejection of reports by the Commission.[83]

As a result of this gridlock, a number of reports have been issued to the public by the SACs without the consent or the support of the Commission. For example, advisory committees from five states in the Midwest Region, including Indiana, Illinois, Michigan, Ohio, and Wisconsin, voted in 1996 to initiate projects focusing on affirmative action. The states requested written commentary from several people who were known to have publicly voiced opinions on the issue of affirmative action.[84] While the reports from Ohio and Wisconsin were approved for public release with all costs underwritten by the Commission, the reports from the Indiana, Illinois, and Michigan SACs were not accepted by the Commissioners.[85] According to Paul Chase, the chairman of the Indiana Advisory Committee, the Commission issued a letter asking the SACs to review the reports submitted by Ohio and Wisconsin, and to use those reports as a template for revisions to the reports rejected by the Commission.[86] After assuring the Commissioners that the SACs had made every effort to include a variety of opinions from people who were thought to have some expertise on the issue, the SACs of Indiana, Illinois, and Michigan voted to release the reports. Some Commissioners responded to the publication of the reports as a statutory violation, but the State Advisory Committee members asserted that the Commission broke the law by rejecting reports without offering any valid reasoning.[87] This controversy over the reports generated several news articles covering the disagreement.[88] Although the SACs produced their reports without any funding from the national office, the goal of engaging in a meaningful discussion over affirmative action never materialized; rather, partisan politics became the primary focus for the public and the media.[89]

It appears as though the Commissioners have deviated from their goal of issuing reports from SACs.[90] The Commissioners who have rejected SAC reports have repeatedly raised issues regarding the balance of presentation within the reports, letting their perceptions of the polarization of political views overshadow the issues the reports seek to address.

Reports are made by the SACs to fulfill their obligations to address critical rights issues. Since the SACs themselves include representation from both major political parties, the SACs' reports reflect a balance of opinion and credible statements on civil rights issues."[91] The reports are used as reference materials by a variety of individuals and organizations. For example, a report by the Illinois SAC, *Civil Rights Issues Facing Asian Americans in Metropolitan Chicago*, was used as a textbook by a professor at Northeastern University.[92] Other SAC reports have been requested by universities, government agencies, civil rights groups, and public citizens looking for facts and information on various civil rights issues.

Despite the problems surrounding the release of reports, the SACs remain a vital part of the U.S. Commission on Civil Rights, and the reports issued by the SACs continue to be a valuable source of civil rights work by the Commission. Through their forums, the SACs allow community members an opportunity to voice their opinions over civil rights issues. The forums have become a useful tool for easing tensions in communities where civil rights problems continue to exist. At its current funding level, only 30% of the Commission's budget is allocated toward the work of the SACs. Cuts in the Commission's budget have resulted in staff cuts in the Regional Offices' staff, and in restrictions in the number of times SACs may convene for meetings. Given their many accomplishments over the past two years, the SACs would make an even greater contribution to civil rights work with an adequate level of funding. Nevertheless, the SACs continue striving toward the goals envisioned from the inception of the Commission.

VI. Appropriations and Reauthorization

The Commission's last two-year reauthorization expired at the end of FY1996.[93] The Commission's budget has remained fixed at $8.74 million for 3 years, despite inflation and higher operating costs.[94] The Commission's continued operation, despite the absence of a formal reauthorization, is based on an April 29, 1992, Opinion by the Comptroller General of the United States, which stated that an agency may continue operating a program whose authorization has expired if an appropriation is made to the agency explicitly for the program by either an annual appropriation act or a continuing resolution.[95]

In February 1998, the Commission endorsed President Clinton's Fiscal 1998 budget plan to increase the Commission's budget to $11 million.[96] President Clinton's budget not only proposed an increase for the Commission, but it also proposed total funding of $602 million for all civil rights enforcement, the largest increase in civil rights enforcement funding in almost two decades.[97] In April 1998, the House passed the U.S. Commission on Civil Rights Reauthorization Act of 1998 (H.R. 3117), providing $8.74 million to the Commission for FY1999, but also imposing greater accountability and management controls (including putting specific deadlines on reports to Congress), in response to the criticisms in the GAO Report.[98] H.R. 3117 also authorized the U.S. Commission to operate through FY2001.[99]

With the passage on October 19, 1998, of the Conference Agreement on the Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, the Commission was reauthorized for FY1999 (to mid-June) at a funding level of $8.9 million, a slight increase from the appropriation proposed in H.R. 3117, but still well below the funding appropriated in the early 1980s.[100] While strict deadlines on reports and other management controls were not contained in the Conference Agreement, the Conference Agreement did note that "concerns remain about the state of basic management controls at the Commission." It also stated: "The conference agreement is based on the expectation that the Commission will continue its efforts to establish accountability for resources, and improve management controls."[101] Under the Conference Agreement, the Commission is required to submit by January 31, 1999, a "comprehensive financial plan for fiscal year 1999 accounting for total available resources by project and activity," as well as a report "detailing the Commission's activities since the last GAO report to improve resource and project management."[102] As described in section IV.A., the Commission appears to be close to implementing the GAO recommendations and "expects to have the GAO recommendations fully implemented by mid-December 1998."[103] Chairperson Berry also sees "no problem" in the Commission meeting the January 31, 1999, deadlines for their financial plan and report on implementing GAO recommendations to Congress.[104]

VII. Commission Goals for FY1999 And Beyond

The Commission's agenda will continue to emphasize three principal areas: federal civil rights enforcement, issues of national civil rights importance, and civil rights developments in states, cities, suburbs, and rural communities.[105] One major project that the Commission is planning on undertaking involves a comprehensive study to measure discrimination in the United States. This project will take a considerable amount of time and planning, but as Chairperson Berry has stated, it "will be useful for all government agencies."[106] The project will also provide a stronger factual basis for conducting a national dialogue on civil rights and for developing federal, state, and local civil rights policies.[107] This type of study will also assist government agencies in making strategic plans regarding discrimination and fulfilling their civil rights enforcement responsibilities.

Another project scheduled to begin by February 1999 will involve a major study focusing on three fundamental questions surrounding affirmative action: (1) what is the controversy concerning affirmative action really about? (2) what have been the positive and negative impacts of affirmative action? and (3) what has been the effect of efforts to eliminate affirmative action programs?[108] The Commission plans to seek expert opinions from all perspectives for the affirmative action study.[109] A hearing will be held and followed by the release of a report that will include the Commission's findings and recommendations. The Commission also plans to develop another national PSA campaign that will be distributed and aired in 1999.[110]

While the Commission has stated that all of the GAO recommendations will be implemented by the end of 1998, it is still in the position of regaining its credibility and status as the nation's premiere civil rights agency. Chairperson Berry feels that an ongoing goal of the Commission is to regain the funding and resources it once had, so that it can operate at "full strength." To operate at "full strength," Berry would like to see the Commission issue federal civil rights enforcement reports for each agency, a function of the Commission in the past before budget cuts.[111] These enforcement reports would serve two primary purposes: (1) assessing the efforts of civil rights enforcement agencies; and (2) assisting the Commission with the handling and tracking of complaints of civil rights abuses. Currently, resources are not available to offer the full range of services that the Commission once was able to provide.

VIII. Recommendations

A. The Commission

Although it is clear from the discussion above that the Commission has accomplished much in recent years, it remains in a precarious position. In terms of ongoing goals, cleaning up the backlog of managerial problems affecting the agency should remain a focal point. The Commission is on track with respect to implementing the corrective actions suggested by the GAO Report. However, in moving beyond the GAO Report, the Commission needs to reestablish credibility in order to end the debate over the agency's value and viability. With that goal in mind, we recommend the Commission: (1) assume accountability by defining realistic goals and completing projects in a timely manner; (2) ensure proper tracking of complaints, including following up on hearings, forums, and reports; and (3) resurrect the overall image of the Commission by addressing internal problems.

A key Commission function involves taking complaints of civil rights abuses and referring these complaints to the appropriate enforcement agencies. However, with proper funding, the Commission should make a commitment to track all complaints that they refer to determine how complaints are being handled by the enforcement agencies. Chairperson Berry has stated that if the Commission were adequately funded, it could improve complaint tracking and timely issuance of reports detailing the response of civil rights enforcement agencies to its referrals and recommendations.

The Commission must publicize its accomplishments and any actions taken as a result of its civil rights work.[112] The Commission should consider using press releases to report the outcomes of hearings, forums, and reports. This will help keep the public informed of the Commission's responsiveness to civil rights concerns.

Inadequate funding also affects the Regional Offices and the SACs. Under current funding, SAC members are only able to meet once a month, which is wholly inadequate, given the important role they play within the Commission. If the Commission's budget is increased, the SACs should receive an adequate level of funding to support their projects. The Staff Director should also work with the Regional Office Directors regarding budget considerations to ensure that the SACs are equipped with the resources needed to continue their exemplary work.

The Staff Director has been criticized for delays in filling open positions on her staff.[113] Based on the performance to date, however, Commissioner Redenbaugh stated that he was taking a "wait and see" attitude to determine whether the Staff Director (and her Office) can utilize the new management information system. In any event, Staff Director Moy must fill staff vacancies and ensure the management information system is effectively utilized.

Finally, though it appears the Commission will respond to each of the recommendations in the GAO Report, some Commissioners still have reservations about the management of the Commission.[114] We would recommend that those Commissioners who still have management complaints, instead of bringing them to the public, set aside partisan politics and contact the Staff Director immediately so the concerns can be addressed internally. The pursuit of Commission mission and goals should be the ultimate objective here.

B. Congress

Given the current civil rights issues facing the country, America's need for a reinvigorated Commission now and into the next millennium is readily apparent. The question facing Congress should not be whether the Commission has outlived it usefulness, but what can Congress can do to help the Commission perform the civil rights objectives envisioned during its creation.

Congress should be commended for asking the GAO to compile an audit report examining the Commission in order to better serve the needs of the American citizenry. Because the GAO Report has been the primary document used to question the viability of the Commission, Congress should make a fair assessment of the Commission's progress in implementing the corrective actions suggested by the GAO. Once the corrective actions have been implemented to the satisfaction of Congress, the independent status of the Commission should be recognized. If Congress is not satisfied with the Commission's progress, it might take steps to change the Commission's structure to help solve the problems of partisan politics among the Commissioners. Many possible solutions have been offered. One plausible solution may be for the President to appoint all of the Commissioners with Senate approval. This system would allow civil rights groups and others to present their concerns over potential nominees, and would enable the President to create a body with fewer political distractions. Another structural consideration involves the number of Commissioners. There should be an uneven number of Commissioners to reduce the four-to-four voting splits.

Congress must also reevaluate its own commitment to civil rights in setting the level of funding for the Commission. Currently, the Commission has only 80 paid employees who must respond to the civil rights concerns of an entire nation. If the Commission is to be most effective, it must receive more money.

Upon approval of the GAO reforms, Congress should increase Commission funding to enable the Commission to achieve the following goals:

- Assist the SACs by increasing the resources of the current Regional Offices and/or increasing the number of Regional Offices.
- Follow up on all complaints that it refers to enforcement agencies.
- Respond immediately to civil rights crises.
- Publicize the Commission's efforts and recommendations so that more people may participate in the Commission's hearings and forums, and benefit from its enforcement reports and complaint process.

In conclusion, Congress should be as responsive to the Commission as the Commission is to civil rights issues. To alleviate congressional concerns that the funds may not be properly managed, appropriation increases could be linked more closely to specific performance goals, time lines, and cost requirements.

C. President Clinton

For the last two years of his Administration, President Clinton can also play a key role in the Commission's continuing resurgence. The President must make a closer connection with the Commission, in words and deeds. For example, although the Commission is independent, the President should entrust the Commission with responsibility for civil rights initiatives, including the analysis of discrimination in America or the "unyielding problem" of poverty and race. In addition, the President must speak out on behalf of the Commission's accomplishments, and if warranted, the need for additional funding. The President could also help influence the way the American people (and Congress) view the Commission. For example, the President could talk about the Commission's timely responses to the church burnings in the South and to complaints by Asian Americans over the skewed portrayal of investigations into campaign fund raising. Finally, because the Staff Director position is so vital to the Commission's success, the President must monitor Staff Director Moy's performance. If Commission management continues to suffer, changes may have to be made.

IX. Conclusion

While the Commission has been plagued with partisan politics, the need for the Commission is as apparent today as it was when President Truman's Committee on Civil Rights recommended establishing a permanent institution on civil rights:

> *Nowhere in the federal government is there an agency charged with the continuous appraisal of the status of civil rights.... A permanent Commission ... perform(s) an invaluable function by collecting data ... mak(ing) possible a periodic audit of the extent to which our civil rights are secure ... serv(ing) as a clearinghouse and focus of coordination for the many private, state, and local agencies working in the civil rights field, and thus be(ing) invaluable to them and to the federal government.*[115]

The question is not whether there is a need for a commission on civil rights; of course, there is. The question is how the Commission can be most effective in leading the fight to preserve civil rights for all. After addressing the concerns outlined in the GAO Report—concerns that have hindered the Commission's credibility and productivity—the Commission will be in a better position to provide useful information to influence the direction of federal policy and civil rights enforcement. The Commission is on the verge of regaining the respect it once enjoyed. With continued refinement, adequate funding for all the branches of the Commission, and proper leadership from its Commissioners, the U.S. Commission on Civil Rights will continue to serve the public and perform the functions envisioned at the time of its creation.[126]

Endnotes

[1] U.S. Commission on Civil Rights, home page, *http://www.usccr.gov/cominfo.html*.

[2] Statement of Mary Frances Berry, Chairperson, the U.S. Commission on Civil Rights, before the Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives (July 17, 1997).

[3] Anne Kornhauser, "The Silent 'Conscience': Civil Rights Commission Is Hardly in Evidence," *Legal Times*, July 1, 1991.

[4] For example, Commissioner Anderson complained he was not allowed to vote on the *Funding Civil Rights Enforcement Report* (1995) while he was vacationing in Europe, even though Chairperson Berry pointed out that she once phoned in a vote on a report while in China. Telephone interview with Mary Frances Berry, Chairperson, the U.S. Commission on Civil Rights (Nov. 12, 1996).

[5] Linda Chavez, "Its Glory Days Are Long Past," *The Washington Post*, July 16, 1997.

[6] U.S. Commission on Civil Rights, *supra* note 1.

[7] Chairperson Mary Berry (Independent) became Chair in November 1993. She is a Professor of History at the University of Pennsylvania, and has served on the Commission since being named Vice-Chair in 1980–82. Vice-Chairperson Cruz Reynoso (Democrat) was appointed by the Senate Majority Leader in April 1993. Justice Reynoso is a Professor of Law at UCLA. Leon Higginbotham, Jr. (Democrat) was appointed a Commissioner by President Clinton on November 30, 1995. Judge Higginbotham is Public Service Professor of Jurisprudence at Harvard University. Yvonne Y. Lee (Democrat), appointed by President Clinton, became a Commissioner on December 6, 1995. Ms. Lee heads a public relations company specializing in Asian community affairs. Russell G. Redenbaugh (Independent) has been a Commissioner since 1990, and was reappointed in December 1995 by the President Pro Tempore of the Senate. Mr. Redenbaugh is a partner and director of Cooke & Bieler, Inc., an investment firm. Carl A. Anderson (Republican) has been a Commissioner since 1990, and was reappointed in February 1996 by the Speaker of the House. Mr. Anderson is Vice President for Public Policy for the Knights of Columbus. Constance Horner (Republican) is a guest scholar at the Brookings Institution in Washington, D.C. Robert George (Independent) is an Associate Professor of Politics at Princeton University. U.S. Commission on Civil Rights, *supra* note 1.

[8] "Political Boom," *Asian Week*, June 26, 1997.

[9] "President Names Ruby G. Moy as Staff Director of the U.S. Commission on Civil Rights," *M2 Press Wire*, June 20, 1997; U.S. Commission on Civil Rights, home page, *http://www.usccr.gov/moy.html*.

[10] Viewpoints, "Civil Rights Commission Is Useful, on the Mend," *The Buffalo News*, Aug. 23, 1997.

[11] U.S. General Accounting Office, *U.S. Commission on Civil Rights—Agency Lacks Basic Management Controls* (July 8, 1997) (GAO/HEHS-97-125).

[12] Written Response by Staff Director and Office of the U.S. Commission on Civil Rights to Michael Kelleher and Michael Walker's Inquiries on Output (Oct. 19, 1998) ("October Response"); U.S. Commission on Civil Rights, *supra* note 1.

[13] Marc Lacey, "Parties Exchange Charges at Hearing on Anti-Asian Bias," *Los Angeles Times*, Dec. 6, 1997.

[14] Esther Wu, "Discrimination Charged in Fund-Raising Imbroglio," *Dallas Morning News*, Dec. 11, 1997.

[15] See also Helen Zia, "Can Asian-Americans Turn the Tide? Media Coverage of and Public Attitudes Toward Asians in the U.S.," *The Nation*, Dec. 22, 1997.

[16] Written Response by Staff Director and Office of the U.S. Commission on Civil Rights to Michael Kelleher and Michael Walker's Inquiries (Nov. 4, 1998) ("November Response").

[17] October Response, *supra* note 12; "Commission on Civil Rights Meeting," *FNS Daybook*, Dec. 6, 1996; U.S.

Commission on Civil Rights, "Briefing Weighs Whether Cuts, Restrictions in Legal Services Are Harmful to Civil Rights," *http://www.usccr.gov/update.html* (May 9, 1997); "Civil Rights Commission Examines Schools and Religion," *PR Newswire Association, Inc.*, May 19, 1998; "U.S. Commission on Civil Rights to Hold New York Hearing on Schools and Religion," *PR Newswire Association, Inc.*, June 9, 1998; "U.S. Commission on Civil Rights to Look at Schools and Religion in the Pacific Northwest," *PR Newswire Association, Inc.*, Aug. 18, 1998.

[18] The following is an annual breakdown of the complaints received from January 1996 through September 1998:

1996 — 2,245 written complaints
1996 — 3,335 telephonic complaints
1997 — 2,115 written complaints
1997 — 4,391 telephonic complaints
1998 — 1,816 written complaints
1998 — 1,179 telephonic complaints

There were no complaints received via the Commission's web page. October Response, *supra* note 12.

[19] *Id.*

[20] U.S. Commission on Civil Rights, home page, *http://www.usccr.gov/chpub.html*.

[21] Telephone conversation with Krishna Toolsie, Assistant to Chairperson Berry, U.S. Commission on Civil Rights (Nov. 9, 1998).

[22] October Response, *supra* note 12; Elizabeth Alexander, "A Troubling Response to Overcrowded Prisons," *The Civil Rights Journal* (Fall 1998); Chevon Fuller, "Service Redlining: The New Jim Crow?" *The Civil Rights Journal* (Fall 1998).

[23] "U.S. Commission on Civil Rights Issues New Booklet on Protecting Your Civil Rights," *PR Newswire Association, Inc.*, March 14, 1997.

[24] Statement of Mary Frances Berry, *supra* note 2.

[25] The estimate of $1 million for airtime of the first PSA was "done by the contractor who developed the Commission's PSA based on air-time cost during time slots used." Statement of Mary Frances Berry, *supra* note 2; November Response, *supra* note 16.

[26] U.S. Commission on Civil Rights, *supra* note 1.

[27] Mary Frances Berry, Chairperson, the U.S. Commission on Civil Rights, Written Response to GAO Report (June 16, 1997). According to Berry's response, only two hearings were held by the Commission between 1983 and 1991.

[28] Eric Lichtblau, "Blacks, Activists Spar Over Abuse, Racism Charges," *Los Angeles Times*, Sep. 14, 1996; "Los Angeles Police Chief, County Sheriff Among Witnesses for Civil Rights Commission Hearing on Racial, Ethnic Tensions," *PR Newswire Association, Inc.*, Sep. 10, 1996.

[29] "U.S. Commission on Civil Rights to Hold Hearing March 6–8 on Racial Tensions in Mississippi Delta," *PR Newswire Association, Inc.*, Feb. 26, 1997.

[30] The "Deep South" includes the following states: Alabama, Georgia, Louisiana, Mississippi, and South Carolina. *Id.*

[31] *Id.*

[32] October Response, *supra* note 12.

[33] "Civil Rights Commission Examines Schools and Religion," *supra* note 17; "U.S. Commission on Civil Rights to Hold New York Hearing on Schools and Religion," *supra* note 17.

[34] *Id.*

[35] Larry Witham, "Panel Hears Views on Religion's Role in School; Students' Rights of 'Free Exercise' in the Spotlight," *Washington Times*, May 21, 1998.

[36] October Response, *supra* note 12.

[37] Berry, *supra* note 27.

[38] Interview with Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights (Nov. 9, 1998).

[39] Berry, *supra* note 27.

[40] Statement of Mary Frances Berry, *supra* note 2; Statement of Wade Henderson, Executive Director, the Leadership Conference on Civil Rights, before the Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives, at an oversight hearing (July 17, 1997); Edward Martin, "For Land's Sake; Class Action Case Against Federal Lending Policies Discriminating Against African-American Farmers," *Business North Carolina* (Nov. 1998).

[41] Statement of Mary Frances Berry, *supra* note 2.

[42] "U.S. Commission on Civil Rights Releases Report on Federal Equal Educational Enforcement in Public Schools," *PR Newswire Association, Inc.*, March 6, 1997.

[43] *Id.*; October Response, *supra* note 12.

[44] U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Releases Report on Federal Equal Educational Enforcement in Public Schools," *http:// www.usccr.gov/ update.html#SpecEd* (undated); October Response, *supra* note 12.

[45] U.S. Commission on Civil Rights, "Study Finds Equal Educational Opportunity for Students With Limited English a Pressing Civil Rights Need," *http://www.usccr.gov/ newsrel.html#LEPRpt* (undated); October Response, *supra* note 12.

[46] "Civil Rights Commission Finds Federal Enforcement of the ADA Falls Short," *PR Newswire Association, Inc.*, Oct. 1998; October Response, *supra* note 12.

[47] *Id.* In addition to the reports previously mentioned, the Commission issued the following reports during this period: (1) transcripts of hearings on southern church burnings, along with staff-prepared executive summaries (Oct. 1996); (2) a report summarizing two days of hearings the Commission held in December 1996 in response to riots in St. Petersburg, Florida (Feb. 1997); (3) *Racial and Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination—Vol. IV: the Miami Report* providing summary and recommendations of a hearing in Florida looking at the impact of language policies and public benefit programs on race relations in the state (Oct. 1997); and (4) *Racial and Ethnic Tensions: the Los Angeles Report* (previously discussed) (July/Sep. 1998). Peter E. Howard, "Civil Rights Panel Preparing to Issue Report on Hearings," *Tampa Tribune*, Feb. 26, 1997; "U.S. Commission on Civil Rights Proposes Task Force to Settle Disputes over Immigration Impact," *PR Newswire Association, Inc.*, Dec. 22, 1997.

[48] U.S. General Accounting Office, *supra* note 11; Michael J. Kelleher, "The Performance of the U.S. Commission on Civil Rights," *in* Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration* (1997).

[49] Commissioner Redenbaugh in particular expressed his frustration with the delays in releasing reports. Telephone interview with Commissioner Russell Redenbaugh (Nov. 11, 1998); Statement of Mary Frances Berry, *supra* note 2; November Response, *supra* note 16; Interview with Mary Frances Berry, *supra* note 38.

[50] November Response, *supra* note 16.

[51] U.S. General Accounting Office, *supra* note 11.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Letter from Commissioners Carl A. Anderson, Robert George, Constance Horner and Russell Redenbaugh to Cornelia M. Blanchette, U.S. General Accounting Office (June 16, 1997).

[56] U.S. General Accounting Office, *supra* note 11.

[57] "Citizens Against Government Waste," *PR Newswire Association, Inc.*, Sep. 9, 1997.

[58] Conference Report on Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, H.R. Rep. No. 105-825 (Oct. 19, 1998); U.S. General Accounting Office, *supra* note 11; November Response, *supra* note 16.

[59] Berry, *supra* note 27.

[60] Letter from Ruby G. Moy, Staff Director, U.S. Commission on Civil Rights, to Michael J. Kelleher (Nov. 10, 1998). While the information system "appears close," the Commissioners hadn't seen the tool in action as of November 1998. Telephone interview with Commissioner Russell Redenbaugh, *supra* note 49.

[61] Office of the Staff Director, U.S. Commission on Civil Rights, Response to GAO Report (June 16, 1997); November Response, *supra* note 16.

[62] Commission actions related to merit promotion, appointment process of the staff, and recruitment program deficiencies. November Response, *supra* note 16. The GAO Report itself noted that the Commission's proposed corrective actions to the OPM recommendations, "if fully implemented, should improve the situation." U.S. General Accounting Office, *supra* note 11.

[63] 144 *Congressional Record* H1254, 1255 (March 18, 1998).

[64] Statement of Representative Charles Canady (R-FL), before an oversight hearing on the U.S. Commission on Civil Rights (July 17, 1997).

[65] Naftali Bendavid, "Affirmative Action Debate: Rights Panel Accused of Blocking Reports," *Chicago Tribune*, Apr. 1, 1998.

[66] Telephone interview with Edward Correa, Special Assistant to the President on Civil Rights (Oct. 13, 1998).

[67] Ruth Larson, "New Race Board Set to Eclipse Civil Rights Commission; Consensus Likelier on Solidly Pro-Preference Clinton Panel," *Washington Times*, June 30, 1997.

[68] *Id.*

[69] November Response, *supra* note 16.

[70] U.S. Commission on Civil Rights, *supra* note 1.

[71] Statement of Mary Frances Berry, *supra* note 2.

[72] Advisory Committee members are reimbursed by the Commission through a per diem subsistence allowance and for travel expenses at rates not to exceed those prescribed by Congress. U.S. Commission on Civil Rights, *U.S. Commission on the Civil Rights State Advisory Handbook* (June 1994).

[73] November Response, *supra* note 16.

[74] Statement of Mary Frances Berry, *supra* note 2.

[75] Bernice Jackson, "Civil Rights Journal: Border Justice," *The Sun Reporter*, June 19, 1997.

[76] Michael Shane, "Probe Urged into Alleged Border Abuses," *Caribbean Today*, July 31, 1997.

[77] David LaGesse, "Watchdog Group Needed to Investigate Border Patrol, Report Says; Immigration Officials Criticize Findings for Omitting Agency's Latest Reforms," *The Dallas Morning News*, May 23, 1997. See also "Report Recommends Creation of Commission to Investigate Misconduct Charges Against INS, Border Patrol Agents," *PR Newswire Association Inc.*, May 22, 1997.

[78] "Rights Panel Probes Deep South Racism," *Tri-State Defender*, Apr. 9, 1997; "Denver & the West" section, *The Denver Post*, March 27, 1997; "Language Topic of Meeting State Panel Seeks Facts on English Proficiency," *Bangor Daily News*, May 31, 1997; "Civil Rights Forum on Korean American Store owners in Baltimore . . . . Do Their Businesses Have Equal Access to City Services, Police Protection, and the Justice System?" *PR Newswire Association Inc.*, July 20, 1998.

[79] The following is a list of SAC hearings since September 1996 obtained by the Office of the Staff Director

("FF" refers to fact finding):

State	**Date**	**Topic**
NY	11/21/96	FF, housing
WI	11/21/96	FF, Hmong in Green Bay
FL	12/3 - 12/4/96	Brief, race relations
MO	12/5/96	Forum, race relations
MT	12/9 - 12/10/96	FF, educ. Native Americans
NY	12/16/96	FF, housing
NY	12/17/96	FF, housing
VA	3/6/97 - 7/97	FF, treatment of blacks in Peninsula
AZ	3/14/97	FF, discrimination in AZ Dept. of Transportation
OK	3/26/97	Forum, complaints
CO	3/27/97	Forum, civil rights issues
IL	4/03/97	FF, update policy in Chicago
TX	4/05/97	Consultation, affirmative action post-*Hopwood*, higher education
MT	4/24/97	FF, educ. Native Americans
WY	5/3/97	Plan/ Brief, state employment
VT	5/13/97	Plan/ Brief, race relations in schools
NE	5/15/97	Plan/ Brief, complaints
CA	5/29/97	FF, civil rights issues Orange County
ME	6/3 - 6/4/97	FF, eq. opp. language-minority students
ME	6/12 - 6/13/97	FF, eq. opp. language-minority students
MN	6/19/97	Forum, affirmative action
AL	6/26/97	Forum, race relations
MI	6/27/97	Forum, ethnic intimidation
MO	8/13/97	Plan/ Forum, complaints
NM	9/15/97	Plan/ Brief, food stamp sting
ND	9/24/97	FF, civil rights enforcement
NY	10/29/97	Plan/ Brief, police-community relations
VT	11/4/ - 11/5/97	Forum, race relations in schools
ID	11/7/97	Forum, racial tensions
CT	11/11 - 11/13/97	Conference, civil rights leadership
WV	11/19 - 11/20/97	Plan/ Brief, civil rights issues
KS	11/20/97	Forum, EEO in state government
RI	2/9/98	Consultation, impact of welfare reform and immigrants
ND	3/19/98	Plan/ Brief, civil rights enforcement
MA	3/21/98	Conference, civil rights leadership
MT	4/2/98	Plan/ Brief, Native American education
UT	4/21/98	Plan/ Brief, civil rights issues Ogden
AR	4/30 - 5/1/98	Plan/ Brief, civil rights issues
CA	5/2/98	FF, police-community relations
SD	5/20/98	Workshop, fair housing
IL	5/29/98	Conference, civil rights issues of blind
OH	6/11/98	FF, minority employment in Montgomery County

State	Date	Topic
MA	6/18/98	Plan/ Brief, civil rights issues Fall River & New Bedford
MI	6/25/98	FF, rehabilitative svcs. provision
TN	7/8 - 7/9/98	FF, plan Title VI enforcement
MD	7/23/98	Forum, Korean American merchants and Balt. Cty. Services
DC	8/6/98	Plan/ Brief, update on mortgage lending discrimination
TX	8/13 - 8/14/98	Plan/ Brief, civil rights issues
HI	8/22/98	Forum, status of Native Hawaiian civil rights after Apology Bill
NJ	9/11 - 9/12/98	Plan/ Brief, civil rights issues Atlantic City
SC	9/15/98	Conference, SC educ. law
AR	9/23 - 9/24/98	FF, need for AR civil rights enforcement agency
OK	9/29/98	FF, Hispanic students in city schools
TX	10/1/98	Workshop, hate crimes

[80] Lisa Singhania, "Report Critical of Civil Rights in Grand Rapids," *Associated Press*, Aug. 11, 1998.

[81] Information faxed by Constance Davis, Midwestern Regional Office Director, on Nov. 6, 1998.

[82] October Response, *supra* note 12; November Response, *supra* note 16; Singhania, *supra* note 80; "Minnesota Advisory Committee to the U.S. Commission on Civil Rights to Release Report on Affirmative Action," *PR Newswire Association, Inc.*, July 6, 1998; "Report Recommends Creation of Commission to Investigate Misconduct Charges Against INS, Border Patrol Agents," *supra* note 77; LaGesse, *supra* note 77.

[83] November Response, *supra* note 16.

[84] Constance Davis, Director of the Midwestern Regional Office, felt that the SACs attempted to present a balance of opinions in their reports and actively sought a variety opinions of those who oppose and favor affirmative action. Telephone interview with Constance Davis (Nov. 6, 1998). See also Bendavid, *supra* note 65.

[85] According to April 4, 1997 minutes, Commissioners Anderson, George, Horner, and Redenbaugh voted against the releasing of the reports by Illinois, Indiana, and Michigan.

[86] Telephone interview with Paul Chase, Chairperson, Indiana Advisory Committee to the U.S. Commission on Civil Rights (Nov. 10, 1998).

[87] Diana Penner, "State Advisory Panel to Issue Rebel Affirmative Action Report," *The Indianapolis News*, Apr. 2, 1998.

[88] *Id.*; Bendavid, *supra* note 65.

[89] *Id.* The members of the Michigan SAC each donated $30 to have copies of their report published; a printing company in Indiana covered the costs of printing their report; and First Penn/ Pacific Life Insurance Co. covered the costs for the Illinois SAC to print 100 reports.

[90] The Commission's acceptance of SAC reports does not mean approval of their contents but rather affirms that proper procedures were adhered to. Minutes of March 4, 1995, Meeting of the U.S. Commission on Civil Rights.

[91] Opening Statement in Paul Chase, *Indiana Consultation: Focus on Affirmative Action Report*. The affirmative action reports from Indiana, Illinois, and Michigan have yet to be "accepted" by the Commissioners. The Commissioners also have refused to accept a report from the Utah SAC on workplace violence.

[92] Information faxed by Constance Davis, *supra* note 81.

[93] U.S. Commission on Civil Rights, *supra* note 1; "In Brief," *The Ethnic NewsWatch*, Apr. 30, 1998.

[94] *Id.*

[95] Opinion of Comptroller General of the United States, *Matter of: Civil Rights Commission*, B-246541 (Apr. 29, 1992).

[96] "Proposed Increase in Civil Rights Enforcement Funding Receives Praise from U.S. Commission on Civil Rights," *PR Newswire Association, Inc.*, Feb. 4, 1998.

[97] *Id.*

[98] An Act to reauthorize the United States Commission on Civil Rights, H.R. 3117, 105th Congress, 2d Session (1998).

[99] "In Brief," *supra* note 93.

[100] Conference Report, *supra* note 58.

[101] *Id.* at 1089.

[102] *Id.*

[103] November Response, *supra* note 16.

[104] *Id.*

[105] Interview with Mary Frances Berry, *supra* note 38.

[106] Statement of Mary Frances Berry, *supra* note 2.

[107] *Id.*

[108] Interview with Mary Frances Berry, *supra* note 38.

[109] Statement of Mary Frances Berry, *supra* note 2.

[110] *Id.*

[111] Interview with Mary Frances Berry, *supra* note 38.

[112] The Commission should respond to the request issued by Mary Moore's "An Open Letter to the U.S. Commission on Civil Rights," Feb. 23, 1998 (*http://www.sonomacountyfreepress.org/features/open-letter0398.html*).

[113] Telephone interview with Commissioner Russell Redenbaugh, *supra* note 49.

[114] *Id.*

[115] President Truman Committee on Civil Rights, *To Secure These Rights*, at 154 (1947).

[116] For suggestions and corrections of the article, the authors are indebted to Brian P. Waldman, Associate with Arent, Fox, Kintner, Plotkin and Kahn. The authors, in the end, are responsible for all research and opinions expressed in the article.

Chapter VIII

A Civil Rights Struggle for the Ages: Why the Administration Must Fight to Save Its Census 2000 Plan

By TerriAnn Lowenthal

I. The Legacy of 1990: A Call for Change

The ink was barely dry on the results of the 1990 census when congressional overseers, community-based organizations and local officials, and the Census Bureau itself declared that the next decennial count in 2000 must be more accurate and less costly.

In mid-July 1991, then-Secretary of Commerce Robert Mosbacher announced that he would not adjust the 1990 census numbers to correct for undercounts and overcounts. The Secretary had agreed to consider such a statistical adjustment after dozens of cities, counties, states, and civil rights groups filed a lawsuit in 1988 to force the Census Bureau to field a "post enumeration survey" that would measure the accuracy of the initial count and provide the basis for correcting the counts to improve their accuracy.[1]

The Secretary's decision not to adjust the 1990 census spurred the plaintiffs in that suit, *City of New York v. U.S. Department of Commerce*, to ask the court to order such an adjustment. The lawsuit ultimately made its way to the Supreme Court, which heard the case in early 1996 and issued a decision a few months later upholding the Secretary's authority not to adjust the counts.[2] But even as local governments and civic advocacy groups continued to fight for an adjustment of the 1990 census well into the decade, many stakeholders and expert observers had also turned their attention to the next census in 2000.

Members of Congress from both political parties, senior Census Bureau staff, mayors, civil rights advocates, and others agreed: the results of the 1990 census were not acceptable. The post enumeration survey had shown that the 1990 census was the first in modern history to be less accurate than the one before it. The national net undercount had risen to 1.6%, from 1.2% in 1980. More troubling, however, the "differential undercount"—the gap between the undercount of whites and the undercount of African Americans and other people of color—was the highest ever recorded since the Bureau began scientific measurements of census coverage in 1940. To make matters worse, the 1990 census cost significantly more than the 1980 census, even though it was less accurate.

It was President Bush's census director, Dr. Barbara Everitt Bryant, who first acknowledged publicly that traditional counting methods could not make the census more accurate or overcome the persistent differential undercount of minority and poor people. Sitting beside Secretary Mosbacher as he explained his decision against adjustment to the House census oversight committee, Dr. Bryant told the lawmakers that she supported a statistical adjustment because she believed the resulting numbers would better reflect the composition and distribution of the population, even though the adjusted counts were not perfect, either. Dr. Bryant also told the committee that the Census Bureau would never find the last few percentage points of the population using conventional direct counting methods alone.

Two weeks later, the senior Republican member (and now Chairman) of the House appropriations panel that funds the Census Bureau testified before the same oversight subcommittee in support of his bill (H.R. 2469) to require a comprehensive review of the census process by the National Academy of Sciences (NAS). Representative Harold Rogers of Kentucky told his colleagues that "we cannot repeat last year's decennial process nine years from now." Saying that the cost of the census was "excessive" and the methods "outmoded," Representative Rogers suggested "[n]ot simply redesigning the decennial census, but *redefining* the decennial census" (emphasis in original). He recommended an independent, "fundamental" study with "no preconceived notions," conducted by a panel convened by the NAS. The Academy, Representative Rogers said, is "credible, experienced, and . . . capable of blending fresh, policy view points with an understanding of statistical methods."[3]

Congress passed and President Bush signed into law the Decennial Census Improvement Act of 1991,[4] based on a bill similar to the one sponsored by Representative Rogers. By the fall of 1992, the NAS had convened a panel of distinguished scientists, chaired by former Office of Management and Budget (OMB) Director and noted economist Charles L. Schultze, to study methods for taking "the most accurate population count possible" and the most efficient way to gather demographic and housing data traditionally collected as part of the decennial census.[5] In addition to the Schultze panel, the Academy convened a second panel at the request of the Commerce Department (the Census Bureau's parent agency) to focus on technical aspects of how to conduct the census. Dr. Norman Bradburn, a distinguished professor at the University of Chicago and Senior Vice President of the National Opinion Research Center, chaired the in-depth study of data collection methods, the level of error associated with different counting techniques, and the use of sampling and estimation as part of the census.[6]

The Commerce Department also reached out to external, nongovernmental stakeholders, many of whom were very displeased with the outcome of the 1990 census. The Department established the 2000 Census Advisory Committee, comprised of about two dozen organizations representing interest groups as diverse as the National Urban League, American Statistical Association, U.S. Conference of Mayors, Housing Statistics Users Group, American Association of State Highway and Transportation Officials, National Congress of American Indians, and U.S. Chamber of Commerce. The Advisory Committee gave external stakeholders an opportunity to be part of the process of redesigning the census, while also providing the Census Bureau with a sounding board for its ideas as the design for 2000 developed.

Independent watchdog agencies also called for a zero-based review of the census process. As early as February 1991, the U.S. General Accounting Office (GAO) advocated a reassessment of the census design, suggesting that the Bureau explore the use of administrative records and sampling procedures to supplement basic data collection activities.[7] Later that year, GAO determined, based on subsequent evaluations, that the 1990 census contained between 14.1 million and 25.7 million gross errors (omissions, duplicates, and other miscounts). The widely reported undercount of 4 million was actually a net figure that obscured the quantity of counting mistakes: the census had missed 8.4 million people, double-counted or made up 4.4 million others, and counted millions more people in the wrong place or in error. The level of error, GAO concluded, "underscore[s] the need for a more effective and efficient approach to taking the census and reinforce[s] the importance of census reform."[8]

In May 1993, Representative Thomas C. Sawyer—then Chairman of the Subcommittee on Census, Statistics and Postal Personnel (formerly the Subcommittee on Census and Population) and widely considered the most knowledgeable member of Congress on census issues—gave a noteworthy speech at an important Census Bureau research conference in Richmond, VA. Representative Sawyer focused on the inaccurate results of the 1990 census, noting that more minorities were not counted in 1990 than the total of all people missed in 1980. "[W]e cannot replay 1990 in 2000," Representative Sawyer said. "We can't because we're changing . . . faster and more profoundly than our ability to measure and perhaps understand that change using current techniques." He pressed the Bureau to "explor[e] the use of sampling techniques as an essential part of the effort to measure the nation using all of the best tools available. . . ."[9]

Dr. Bryant had already taken the bipartisan, genuine, and widespread interest in reforming the census to heart. She set in motion a broad review within the Census Bureau of alternative census designs, ranging from a full sample census, to a count based entirely on administrative records, to a mix of more aggressive direct counting methods with statistical techniques. As time went by, GAO expressed growing concern about the pace of reform;[10] however, Dr. Bryant is widely credited with acknowledging the limits of the traditional census design and setting the Bureau on a path toward reform.

II. Clinton's Early Years: The Census Takes a Back Seat

Intruding on this steady, if low-key, march toward a better census was the election of William Jefferson Clinton as President in 1992. Representative Sawyer, rightly afraid that Clinton would all but ignore the important work being done at the Census Bureau in the flurry of activity surrounding any new administration, suggested to Clinton's advisers that Dr. Bryant be asked to stay in her position until the President could nominate a successor. But with no indication in the waning days of the Bush presidency that the new President would follow this advice, Dr. Bryant tendered her resignation and returned to the University of Michigan. She renewed her work in survey research and wrote a book about her experience heading arguably the most closely watched and heavily criticized census in our nation's history.[11]

The new Administration's lack of interest in retaining Dr. Bryant even temporarily proved to be unfortunate. The position of Census Bureau director would remain vacant for nearly two years, depriving the agency of what GAO called a "fully vested and authoritative voice."[12] (President Clinton's late nomination of a census director continued an unfortunate trend. In the Bush Administration, the position was vacant for a year before the President put Dr. Bryant in office with a recess appointment as 1989 drew to a close, just in time for the start of the 1990 count.) By October 1993, GAO had already cited the lack of a director as a "significant obstacle to achieving fundamental census reform" in 2000.[13]

The Administration's role in overseeing the Bureau's work on a new census design was complicated by the continued litigation over the results of the 1990 count. The Justice Department found itself in the awkward position of having to defend the decision of former Secretary Mosbacher not to adjust the 1990 census, even as the new Administration tried to build support for a census that included the very statistical procedures Mosbacher had rejected. In the end, even though the Supreme Court refused to order the adjustment sought by the municipal litigants, it recognized a broad delegation of authority to the Secretary of Commerce in determining how best to conduct the census—a level of discretion that the Clinton Commerce Department could use to justify its support for new census methods in 2000.[14]

The President had announced shortly after his election that Democratic National Committee Chairman Ronald Brown would be Secretary of Commerce. But the Senate delayed confirmation of his nominee for Commerce Under Secretary for Economic Affairs, Everett Ehrlich, due to some concerns about Ehrlich's past political activities. The Under Secretary was responsible for the Department's statistical programs, including Census Bureau activities, and until Dr. Ehrlich cleared the Senate confirmation process, no lesser positions in the Economics and Statistics Administration (ESA) could be filled.

After Dr. Ehrlich's confirmation in late 1993, the Administration slowly turned its attention to choosing a nominee for Census Bureau director. Several promising candidates surfaced but fell prey to the strict "vetting" process before the President settled in 1994 on Dr. Martha Farnsworth Riche, a well-respected demographer with substantial research and policy experience but little exposure to the rough and tumble world of politics. Dr. Riche would take office in the fall of 1994, just as Republicans were celebrating their historic takeover of Congress.

III. Underestimating the Opposition

Over the next year, Director Riche and Under Secretary Ehrlich led the Administration's effort to finalize the Census Bureau's redesign of the census process. Their task was complicated by the monumental and swift changes in Congress brought about by the new Republican majority. The House census subcommittee, which had been closely monitoring the 2000 planning process in a bipartisan manner, was abolished. Responsibility for overseeing the census shifted to a new panel under the auspices of the restructured Committee on Government Reform and Oversight. The new majority clearly hadn't made the next census a priority; the Subcommittee on National Security, International Affairs, and Criminal Justice assumed jurisdiction over the Census Bureau's activities. With an entirely new cast of members and staff who had little if any knowledge of the census beyond its rudimentary requirements to count the population for apportionment purposes, the subcommittee all but ignored the 2000 census and did not hold its first hearing on the topic until October 1995.

In late February 1996, the Census Bureau publicly unveiled its plan for 2000, focusing on four strategies to guide the re-engineered process.[15] One of the strategies was to "make greater use of statistical methods" to improve accuracy and contain costs.

The Census Bureau had ample scientific grounding for its decision to incorporate statistical sampling as part of the counting process. In 1994, both panels convened by the National Academy of Sciences to review census methods and data needs concluded, in the words of the Schultze panel, that "[i]t is fruitless to continue trying to count every last person with traditional census methods of physical enumeration. . . . It is possible to improve the accuracy of the census count with respect to its most important attributes by supplementing a reduced intensity of traditional enumeration with statistical estimates. . . ."[16] Similarly, the Bradburn panel concluded that current methods alone would not reduce the differential undercount and it recommended a greater role for statistical sampling "to obtain a more accurate picture of the population."[17] Between them, the two panels endorsed the use of sampling both to complete the door-to-door visits to unresponsive households (known as "sampling for nonresponse follow-up") and to measure and then correct for undercounts and overcounts using a larger, more sophisticated version of the 1990 post enumeration survey (known as the "Integrated Coverage Measurement" program).

But the lack of congressional scrutiny that followed the Republican takeover in 1995 may have given the Administration a false sense of confidence that its Census 2000 plan would be received with open arms. Drs. Riche and Ehrlich also apparently believed that historically undercounted population groups would strongly support new methods designed to correct for the anticipated undercount in 2000, even without a thorough understanding of those methods. The wake-up calls came in the spring of 1996.

First, African American legislators and advocacy organizations questioned part of the sampling design, believing that more people of color would be estimated than counted directly. The Bureau's original plan called for making direct contact—either by mail or by a personal visit—with 90% of the households in a county. The characteristics of the remaining 10% of households would be estimated based on information gathered by census takers from the other unresponsive households. Civil rights advocates and others feared that because many counties were large and diverse, the easier to count, often non-minority households, would make up more of the 90% reached directly, while harder-to-count, primarily minority households were more likely to fall within the estimated 10%.

The stakeholder concerns were heightened by confusion over the two distinct uses of sampling in the Bureau's plan. It was the second use of sampling—the 750,000-household post-census survey—that was designed to check the quality of the initial count and to provide a basis for statistically adjusting the numbers before they became final. In other words, the second use of sampling held the key to reducing substantially the differential undercount of minorities and the poor that had grown worse in 1990. But the Commerce Department had decided that the best way to build support for sampling was to blur the distinction between its two significant uses, thereby gaining support for the first use based on anticipated support for the second, since the latter was modeled after the adjustment sought by civil rights advocates, local elected officials, and other community-based groups during the 1990 count.

While the decision to minimize public discussion of the highly complex statistical procedures proposed for 2000 was understandable, the Commerce Department nevertheless miscalculated badly, nearly losing support for its plan among communities of color in the months after unveiling it. Intervention by the newly established Census 2000 Initiative, a privately funded, non-partisan communications project, helped bring the two sides together to discuss the stakeholder concerns. By the fall of 1996, the Commerce Department had announced that the Bureau would apply its 90% target rate for direct household contact at the census tract level, a much more homogenous area with an average of only 1,700 housing units. The following year, the Bureau announced a further modification to the non-response sampling design: the size of the sample of unresponsive households that census takers would visit in person would vary based on the mail response rate in each census tract. The lower the mail response rate, the higher the number of households in the sample in each tract.

In the meantime, congressional Republican leaders were quietly plotting the start of an all-out attack on the use of sampling. In June 1996, with no warning, the House Committee on Government Reform and Oversight unveiled a report drafted by the majority staff that condemned the proposed uses of sampling to complete the count and then to correct for undercounts and overcounts. A hastily organized and informal but broad coalition of census stakeholders immediately condemned the majority's findings, forcing the committee to postpone its scheduled vote on the report. Nevertheless, before the end of the 104th Congress, committee Republicans renewed their effort for a public condemnation of sampling, and the report was adopted by a mostly party-line committee vote that September.[18]

The untimely death of Commerce Secretary Ronald Brown in the spring of 1996 was also a setback on the road to a more accurate and cost-effective census in 2000. As head of the Democratic Party during the 1990 census, Secretary Brown had understood the substantial implications of an accurate census for the fair distribution of political representation and fiscal resources. Brown was the most senior official to take more than a passing interest in Census 2000 planning during the early years of the Administration, and his death left a void that would take some time to fill.

Despite Secretary Brown's knowledge of census issues, he had been unable to devote a great deal of time or effort to promoting an activity that was still eight long years away and had not yet generated the harsh partisan debate that would nearly bring the federal government to a standstill several years later. The career professionals at the Census Bureau had continued their research on new census methods under the watchful eye of a handful of dedicated congressional authorizers and appropriators and the National Academy of Sciences panels, but largely out of the public eye and media spotlight. Secretary Brown had turned his attention to issues of more immediate importance to the new Administration, including the bruising fight with Congress over approval of the North American Free Trade Agreement (NAFTA) in the fall of 1993.

Secretary Brown's successor, businessman William Daley of Chicago, was keenly aware of the growing interest in Congress and among stakeholders in the Census 2000 plan. But other pressing issues demanded his attention, while the emerging controversy over census methods involved arcane and complex scientific issues that would take some time to master.

The new Secretary also had to walk a fine line between exercising a leadership role in conducting the census delegated by law to his office and avoiding charges by the Republican majority in Congress that the Commerce Department was "politicizing" the census by interfering in decisions affecting the choice of counting methods. Early in his tenure, Secretary Daley made few public statements about the census and the Bureau's plan to improve accuracy, leading some stakeholders to conclude that the Administration was not committed to ensuring a more accurate count in 2000.

IV. The War Begins: High Stakes Census Game Finally Catches The President's Attention

The House oversight committee's brief but pointed rebuke of the Census Bureau's plans to use sampling in the 2000 census should have been a wake-up call for the Administration, perhaps prompting a higher level of attention to the issue than had been apparent before. But there was little evidence that any senior White House aides, not to mention the President himself, were engaged in the brewing controversy over the Bureau's 2000 census plan.

The sampling debate in Congress, in fact, faded from public view once again, perhaps because the Republicans were distracted by the November 1996 elections that diminished their margin of control in the House. The subcommittee chairman whose panel oversaw the census in addition to activities of the FBI and Drug Enforcement Administration left Congress after losing a bid to become governor of New Hampshire. Representative J. Dennis Hastert of Illinois, the fourth highest ranking member in the House Republican hierarchy, was tapped to head the panel. While it did not appear that Representative Hastert was personally interested in how the census was conducted, he clearly had a direct line to the top of his party's leadership ladder and would become, in short order, their point man in the battle to stop the Census Bureau from using sampling in 2000.

If the White House was asleep at the switch on census issues so far, its sleep was forever interrupted in May 1997, when Congress debated an emergency supplemental spending bill for the victims of recent floods in the Northwest and Midwest and for peacekeeping troops in Bosnia. Emboldened by some unknown calculation that they could outwit the President, the Republican congressional leadership tried to attach a legislative ban on sampling in the census to the emergency funding measure. They badly underestimated the President's bargaining strength, however, a mistake House Speaker Newt Gingrich later lamented in his second book, *Lessons Learned the Hard Way*.[19] Clinton promptly vetoed the bill, accusing the Republicans of playing politics with badly needed emergency funds for average Americans whose communities were devastated by the flooding. Congressional Republicans, back in their districts for the Memorial Day recess, heard an earful from their constituents and the media, barely none of whom could fathom why Republicans wanted to hold up emergency spending over plans for a census that was still three years away. After returning to Washington, congressional leaders hastily brought a clean bill without the census rider to the floor and handed the President his first victory in the war over census methods. The final bill[20] did, however, require the Census Bureau to produce a detailed report on the proposed use of statistical methods in the 2000 census.[21]

But if the President won the first battle in the escalating dispute over census methods, there was no clear White House strategy to capitalize on the victory. The highly visible tussle over the sampling ban in the emergency funding bill energized congressional supporters of the Bureau's Census 2000 plan (primarily Democrats in the House) and a wide range of stakeholder groups. The desperate, if ill-fated, attempt to hold the emergency appropriations hostage to the census rider had revealed a deep commitment on the part of Republicans to prevent the Bureau from using the only new methods that, according to virtually all expert observers, would reduce the differential undercount. The Bureau's congressional and external supporters quickly (and correctly) concluded that the fight over the flood relief measure was a warning signal from Republican leaders determined to stop the Census Bureau from conducting a census that included sampling. Using press conferences, floor statements, and other locally based activities, they elevated public discussion of the consequences of an inaccurate census in 2000.

It didn't take long for the next fight over sampling to erupt. The battleground was the appropriations bill that included funding for the census for fiscal year 1998.[22] House Republicans included language in the bill that prohibited the Bureau from spending any funds to prepare for a census with sampling until the Supreme Court ruled on the constitutionality of the methods. The provisions drew a veto threat from the President and led to a protracted, mostly behind-the-scenes battle that threatened programs as diverse as national weather forecasting, overseas embassy operations, and federal law enforcement activities covered under the same funding bill. As the start of the new fiscal year came and went on October 1, both sides hunkered down for an extended period of negotiations while the Bureau operated under a temporary spending resolution that forced it to delay the start of several key census preparation activities for lack of sufficient funds.

The President's outwardly tough stance to preserve sampling, however, was not enough to mollify the Bureau's staunch congressional and external supporters. It soon became apparent that the White House, in an effort to resolve high-profile controversies that were delaying enactment of several appropriations bills, was negotiating behind closed doors directly with the Republican leadership, leaving congressional Democrats and outside stakeholders largely in the dark about what the Administration was willing to accept to wrap up the census funding measure.

The agreement hammered out by senior White House staff (with assistance from senior Commerce Department officials) and the very top of the Republican leadership drew fierce criticism from many sampling supporters, leading many of them in Congress to oppose the final bill. The agreement authorized any party to file a lawsuit challenging the constitutionality or legality of sampling methods; such cases would be heard by a special three-judge district court panel, with appeals going directly to the Supreme Court. The bill specifically authorized the Speaker of the House to use legislative funds to challenge the Bureau's Census 2000 plan in court. The negotiators agreed to create an eight-member Census Monitoring Board, with congressional Republican leaders and the President each appointing four members. The Board would receive $4 million annually to carry out a broad-based review of census preparations and operations, with an office to be located at the Bureau's headquarters. The bill also required the Census Bureau to release not only final census numbers but another set of figures representing the counts achieved without the use of sampling or statistical estimation. Finally, though not included in any legislative language, negotiators agreed that the Census Bureau would begin preparing for two censuses: one that incorporated sampling methods and one that didn't. The latter requirement would be known as "dual track preparation."

In a "Dear Colleague" letter on the day of the vote, several key House Democrats, including Minority Whip David Bonior, Census Caucus Co-Chair Carolyn Maloney, and the chairs of the Congressional Black and Hispanic Caucuses, urged their colleagues to reject the Commerce appropriations bill. The "deal" between the Administration and Republican leaders, these members said, would allow sampling opponents "to disrupt and discredit the census." A "no" vote would allow the President to "get a better deal than this," these members concluded.

On November 13, as its last substantive order of business before adjourning for the year, Congress passed and the President signed the conference bill that included funding for Census 2000 preparations, six weeks after the start of the fiscal year.[23] The final vote in the House was 282 to 110, with a significant number of "no" votes signaling displeasure with the White House for its handling of the census sampling controversy.

V. The Fight Continues

While the bickering over census methods had disrupted the flow of legislative activity and even threatened to force a shutdown of important unrelated government functions, President Clinton remained oddly silent on the issue, much to the chagrin of the Bureau's supporters. Other than brief, albeit strong, statements tied to the passage of funding bills, the President had little to say publicly about the raging dispute over census methods until June 1998, when he hosted a roundtable discussion about the census during a trip to Houston. While the event received broad coverage in the press, congressional critics of the Census Bureau's Census 2000 plan seized upon a weak comparison the President made between political polling and the use of sampling in the census to bolster their own rhetoric in opposition to sampling. "Most people understand that a poll taken before an election is a statistical sample," the President was quoted as saying. "And sometimes it's wrong, but more often than not it's right."[24] The comparison did little to build public confidence in the Bureau's redesigned census.

In the meantime, the provisions of the November 1997 "agreement" over census funding gave the Bureau's critics the resources and authority they needed to step up their fight against sampling. In February 1998, the conservative, Atlanta-based Southeastern Legal Foundation filed a suit to prevent the Census Bureau from using sampling to count the population for purposes of congressional apportionment.[25] Days later, the House of Representatives filed a similar suit at the direction of Speaker Gingrich, challenging the constitutionality and legality of sampling.[26] The cases were heard in August and June, respectively. Much to the dismay of the Bureau's supporters and the delight of sampling opponents, both courts issued unanimous opinions concluding that the Census Act (Title 13 of the United States Code) barred the use of sampling for purposes of determining the population for congressional apportionment. Neither court reached the question of whether Article I, section 2 of the Constitution also prohibited the use of sampling methods for that purpose. Under the expedited judicial review provisions of the 1998 appropriations act, the Supreme Court agreed to hear the government's appeal in both cases on November 30, 1998. The Census Bureau is continuing its dual-track preparations for the census until the Court issues a ruling in the cases, presumably before its 1998-99 term ends early next summer.

In addition to launching a legal attack against sampling, congressional Republicans stepped up their war of words against the Bureau's Census 2000 plan by reconstituting a census oversight subcommittee. Formally organized in February 1998, the Subcommittee on the Census received over $1 million for its activities from a special House fund controlled by the Speaker, less than one-third of which was given to the minority Democrats on the committee. The panel's new chairman, Representative Dan Miller of Florida, and his staff began an all-out assault on sampling, focusing little attention on other components of the census process that would benefit from a thorough review by Congress and other agency watchdogs. Of the handful of hearings held during the panel's first year, nearly all focused on perceived problems with the proposed statistical methods for 2000. The subcommittee's majority members invited only witnesses who supported their position against sampling to testify, allowing the minority members to invite one or two additional witnesses who could bring some balance to the discussions.

The endless attacks on the Census Bureau's work, replete as they were with factual mistakes and minimal scientific grounding, surely took a toll on the several thousand career employees at the agency. Even as they struggled valiantly to answer charge after charge levied at their census plan, the staff continued its unprecedented effort to prepare for two kinds of censuses at the same time, when preparing for one is enough to drain even the most energetic and committed employees. Yet this most serious consequence of the open warfare between the majority in Congress and the Administration received little, if any, attention from policymakers, as the Bureau itself continued to put in place the vast infrastructure needed to conduct a census less than two years away.

Despite the escalating rhetorical war, however, Congress remained distracted by other events unfolding at the White House through much of 1998, resulting in a failure to enact most appropriations bills, including the Commerce Department's, by the end of the fiscal year on September 30. By early October, with most of the government operating under a temporary spending bill, Congress and the Administration had to decide whether to force a showdown over the use of sampling as part of the fiscal year 1999 funding process or put off final resolution of the dispute until the following year, when both sides hoped the Supreme Court would rule on the pending litigation. With the clock ticking toward the mid-term elections and lawmakers anxious to leave town, they punted.

Prodded by House Democrats who hadn't forgotten the previous year's back-room deals, and by outside stakeholder groups led by the Leadership Conference on Civil Rights, the President pushed the Republican leaders to provide full funding for the final year of census preparations, while delaying the showdown over sampling methods until June 15, 1999, near the end of the Supreme Court's spring term.

VI. Conclusion: A Fight Worth Winning

In testimony before Congress last year, Wade Henderson, Executive Director of the Leadership Conference on Civil Rights, called a fair and accurate census "one of the highest priorities of the civil rights community." Mr. Henderson expressed hope that the subcommittee's review of the 1990 census would help "our nation [move] a step closer to ensuring that we do not repeat the same mistakes again."[27]

In 1999, the Census Bureau must make final decisions about census methods and operations and put in place the vast infrastructure needed to support the nation's largest peacetime activity. The fate of its plan to augment direct counting with statistical methods will depend, in large part, on the resolve of President Clinton and senior Administration officials to stand on principle and stand up to the fiercely partisan campaign to block the fundamental changes in census-taking so fervently sought by Republicans and Democrats alike at the start of the decade.

No one should underestimate the power of the congressional majority to impose its position on the Census Bureau through legislative force. Debates about sampling and nonsampling error, correlation bias, and demographic post-strata are enough to make most Americans' eyes glaze over, if the concepts haven't gone right over their heads first. As long as the debate over census methods takes place largely within the confines of the political process in Washington, the Administration remains at a disadvantage. After all, the Constitution grants *Congress* the authority to decide how to conduct the census, although legislation directing census methods must be signed into law by the President. If members of Congress can shield the public from the scientific and operational facts about the census, the dispute over sampling will be resolved in back rooms by politicians with political agendas.

But the Administration has several things going for it in this fight. Most importantly, the weight of expert scientific opinion heavily favors the use of statistical methods to supplement a direct counting effort. Respected columnist David Broder, who has been following the sampling debate closely for several years, wrote in late 1998: "If the question is how to get the most accurate possible count of Americans, the weight of the argument is heavily on the side of the White House."[28] The vast majority of editorial boards across the country have supported the Census Bureau's plan and have taken the Republicans to task for putting partisan politics above an accurate count. And why not? Three separate expert panels convened by the National Academy of Sciences, the U.S. General Accounting Office, and the Commerce Department's Office of the Inspector General all have endorsed a census plan that includes some sampling. Many scientific associations, such as the American Sociological Association, publicly support the plan, and none have opposed it. A blue ribbon panel of the American Statistical Association, while not taking a formal position on the specific design for Census

2000 (which was still being developed at the time the panel conducted its review), concluded in 1996 that "sampling has the potential to increase the quality and accuracy of the count and reduce costs," the goals set by Congress at the start of the decade.[29]

The barely concealed partisan calculations underlying the fierce campaign to stop the use of modern scientific methods also bolster the Administration's position in support of the best counting techniques available. Speaker Gingrich and other prominent Republicans urged Secretary Mosbacher to adjust the 1990 census using statistical methods, claiming that the high undercount deprived their states and constituents of their fair share of political representation and federal aid. It is difficult to take the criticism of statistical methods at face value when the critics have changed positions so completely in full public view.

Yet in order to build broad public support for the Census 2000 plan in the short time left before the final design decision is made, the Administration—led by the President—must carry its message well outside of Washington, D.C., directly to the communities that will be harmed by an inaccurate count. The President, the Secretary of Commerce and other cabinet officers, and the Census Bureau's new director, Dr. Kenneth Prewitt, must stand shoulder to shoulder with mayors and ministers, civil rights leaders and educators, county officials, and health care providers. They must look Americans of all races, ethnic backgrounds, economic circumstances, and geographic areas in the eye and tell them that if we take the same census in 2000 that we did in 1990, we will spend hundreds of millions, if not billions, of dollars more than we need to for a census that will miss millions more Americans than it should. That message is difficult to ignore. The Constitution may vest responsibility for the census in the Congress, but members of Congress derive their power directly from the people. If most Americans support a more accurate and cost-effective census in 2000, the majority in Congress should support that result as well.

Virtually all experts agree with one sad conclusion: Without fundamental changes in the census process, there is little hope that the Census Bureau can reduce the persistent and highly disproportionate undercount of people of color and the poor that has plagued the census for so long. And a growing number of Americans will begin yet another century without the equality of representation and economic opportunity they have worked so hard to achieve, but have yet to realize fully.

Endnotes

[1] *City of New York v. U.S. Department of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989) and 739 F. Supp. 761 (E.D.N.Y. 1990).

[2] *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

[3] Testimony of the Honorable Harold Rogers, before the House Subcommittee on Census and Population, Committee on Post Office and Civil Service, "To Review Major Alternatives for the Census in the Year 2000" (Aug. 1, 1991).

[4] Public Law No. 102-135 (1991).

[5] Committee on National Statistics, National Research Council, Preface to *Modernizing the U.S. Census, Report of the Panel on Census Requirements in the Year 2000 and Beyond* (National Academy Press Nov. 1995).

[6] Committee on National Statistics, National Research Council, Preface to *Counting People in the Information Age, Report of the Panel to Evaluate Alternative Census Methods* (National Academy Press 1994).

[7] Testimony of L. Nye Stevens, General Government Division, U.S. General Accounting Office, before the House Subcommittee on Census and Population (Feb. 21, 1991) (GAO/T-GGD-91-8).

[8] U.S. General Accounting Office, *The 1990 Census: Reported Net Undercount Obscured Magnitude of Error* (Aug. 1991) (GAO/GGD-91-113) (report of the U.S. General Accounting Office to the House Subcommittee on Census and Population).

[9] Speech by Rep. Thomas C. Sawyer, "Rethinking the Census: Reconciling Demands for Accuracy and Precision in the 21st Century" (May 7, 1993).

[10] See, for example, testimony of William M. Hunt, General Government Division, U.S. General Accounting Office, before the House Subcommittee on Census, Statistics, and Postal Personnel (March 2, 1993) (GAO/T-GGD-93-6).

[11] Ironically, Dr. Bryant would continue her significant efforts in support of a more accurate census, speaking in support of the Census 2000 plan and publicly challenging congressional Republicans who opposed the plan.

[12] Testimony of William M. Hunt, General Government Division, U.S. General Accounting Office, before the House Subcommittee on Census, Statistics and Postal Personnel (Jan. 26, 1994) (GAO/T-GGD-94-80).

[13] Testimony of L. Nye Stevens, General Government Division, U.S. General Accounting Office, before the House Subcommittee on Census, Statistics and Postal Personnel (Oct. 7, 1993) (GAO/T-GGD-94-12).

[14] See *Wisconsin v. City of New York,* 517 U.S. 1, 19 (1996).

[15] See generally U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *The Plan for Census 2000* (Feb. 28, 1996).

[16] National Research Council, *Modernizing the U.S. Census, supra* note 5, at 3.

[17] National Research Council, *Counting People in the Information Age, supra* note 6, at 4.

[18] U. S. House of Representatives, *Fourteenth Report by the Committee on Government Reform and Oversight together with Additional and Dissenting Views, Sampling and Statistical Adjustment in the Decennial Census: Fundamental Flaws*, H.R. Rep. No. 104-821 (1996).

[19] Newt Gingrich, *Lessons Learned the Hard Way*, at 148 (1997). Also see generally *id.* at 135-141, 144.

[20] Public Law No. 105-18 (1997).

[21] U.S. Department of Commerce, Bureau of the Census, *Report to Congress: The Plan for Census 2000* (1997) (originally issued July 1997, revised and reissued August 1997).

[22] H.R. 2267, 105th Congress (1997) (the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Bill, Fiscal Year 1998).

[23] Public Law No. 105-119 (1997).

[24] "Clinton Speaks Up on Census, Pushing the Use of Sampling," *The New York Times*, June 3, 1998, at A1.

[25] *Glavin v. Clinton*, case number 98-207-A, in the United States District Court for the Eastern District of Virginia.

[26] *U.S. House of Representatives v. U.S. Department of Commerce*, case number 1:98CV00456-RCL, in the United States District Court for the District of Columbia.

[27] Testimony of Wade Henderson, before the Subcommittee on the Census, Committee on Government Reform and Oversight, U.S. House of Representatives on "Revisiting the 1990 Census" (May 5, 1998).

[28] David Broder, "Stuck on the Census," *The Washington Post*, Oct. 4, 1998.

[29] American Statistical Association, *Report of the Census Blue Ribbon Panel* (Sep. 1996).

Chapter IX

Enforcing Voting Rights in the Clinton Administration As We Approach the New Millenium

by Todd A. Cox

Introduction

> *The fairness of any legal system can be measured by the availability of adequate remedies to protect one's rights. Thus, the essential question is, does one have free access to a court or legislative body to obtain vindication where a human right has been infringed?*
>
> A. Leon Higginbotham, Jr., *In the Matter of Color, Race and the American Legal Process: The Colonial Period* (1978).

As the next century approaches, the voting rights of the nation's minorities are at an important crossroads. At the beginning of the first Clinton Administration, lawsuits challenging redistricting plans that contained minority-opportunity districts (i.e., districts providing minorities an equal opportunity to elect candidates of their choice) threatened to eliminate the electoral gains won following the 1990 redistricting.[1] As the first half of the second Clinton Administration draws to a close, there are continued threats to minority voting rights from new *Shaw* challenges, as well as new questions raised in the enforcement of both the Voting Rights Act of 1965[2] and the National Voter Registration Act of 1993 (NVRA).[3] The Administration will have to be proactive in its law enforcement and creative in developing responses to the challenges that have become inevitable in enforcing voting rights laws. Depending on the enforcement strategies implemented by the Administration, minority electoral gains will either be protected or suffer severely as we near the next century and the next redistricting cycle. With the first two years of the second term of the Clinton Administration as a backdrop, this chapter will briefly examine the burgeoning and continuing threats to minority voting rights that the Administration will have to confront in the following areas: (1) enforcement of section 2 of the Voting Rights Act[4] in the wake of *Shaw* and its progeny; (2) enforcement of section 5 of the Voting Rights Act[5] in the wake of *Shaw* and recent Supreme Court rulings; and (3) enforcement of the NVRA in light of recent legislative attacks, as well as the persistent resistance by states, and potential obstacles relating to changes in the laws that affect the agencies through which the NVRA is implemented.

I. Continuing to Ensure Electoral Opportunities in the Post-*Shaw* Era

Although the country is fast approaching the 2000 census and a new redistricting cycle, the courts are still resolving battles over redistricting plans developed after the 1990 census. In the wake of *Shaw v. Reno*,[6] and *Miller v. Johnson*,[7] several Supreme Court rulings on Fourteenth Amendment Equal Protection challenges to majority-black or Hispanic congressional districts have helped clarify the criteria for creating minority-opportunity districts. Through these decisions, the Supreme Court has made a definitive statement that the Voting Rights Act is still valid, and that there is a compelling justification for creating majority-minority districts to remedy violations under the Act.

In *Shaw v. Hunt*[8] and *Bush v. Vera*,[9] the Court once again addressed the constitutional standards that apply to congressional districts that were drawn to create equal electoral opportunities for minority voters. In *Shaw v. Hunt*, the Court reviewed North Carolina's 1990 congressional plan, following a full trial on the merits regarding the constitutionality of North Carolina's Twelfth and First Congressional districts.[10] Similarly, *Bush v. Vera* involved a challenge to three congressional districts in Texas. In both cases, the Court ruled that all of the challenged districts were unconstitutional under the Fourteenth Amendment because they were not narrowly tailored to further a compelling governmental interest.[11]

However, the Supreme Court's rulings in the *Shaw* line of cases have not eroded the need for states and local jurisdictions to be sufficiently "race conscious" in their redistricting processes so as to avoid diluting minority voting strength. Indeed, in *Bush*, the Court stated that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.... Nor does it apply to all cases of intentional creation of majority-minority districts."[12] As Justice O'Connor observed:

> *States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, and that neglect is predominantly due to the misuse of race, does strict scrutiny apply.*[13]

Moreover, Justice O'Connor has made clear that nothing in *Shaw* or its progeny should be interpreted as calling into question the continued importance of complying with section 2 of the Voting Rights Act:[14]

> *The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. S. Rep. No. 97-417, p. 4 (1982).*[15]

Justice O'Connor recognized that "it would be irresponsible for a State to disregard the § 2 results test,"[16] concluding that states have a compelling interest in complying with section 2 of the Voting Rights Act and, more specifically, in complying with "the results test as this Court has interpreted it."[17] Justice O'Connor's opinion confirms that reasonably compact majority-minority districts are not inevitably subject to challenge under the constitutional claim recognized in *Shaw*, and that jurisdictions continue to have a compelling interest in complying with the Voting Rights Act.[18]

The most recent Supreme Court decision in this area is instructive. In *Lawyer v. Department of Justice*,[19] the Court upheld the constitutionality of a majority-minority state senate district in the Tampa Bay, Florida, region. In this case, the district court approved a settlement plan that reduced the total minority voting-age population in the challenged district from an original 55.3% to 51.2% through reconfiguration of the district to one that was characterized as still somewhat oddly shaped, albeit "less strained and irregular."[20] In determining whether it would approve the new boundaries, the district court placed primary importance on the fact that the new plan "offers to any candidate, without regard to race, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat."[21]

The Supreme Court upheld the settlement, finding that race, while a factor, did not predominate and subordinate Florida's traditional redistricting criteria.[22] Although the new district splits three counties and several municipalities and is irregularly shaped, the Court held that none of these factors required a finding that the district was unconstitutionally race-based. The Court relied on the district court's finding that Florida has traditionally drawn districts that encompass more than one county and cross bodies of water, and that the district at issue therefore was not a dramatic departure from Florida's traditional redistricting principles. It thus acknowledged for the first time an important limit on the Shaw doctrine: a majority-minority district's adherence to "traditional redistricting principles" should be judged according to the principles the state itself applies in drawing districts rather than abstract concepts of ideal compactness and shape. In another case, *King v. State Board of Elections*, the Court affirmed without an opinion a district court ruling that Illinois' Fourth Congressional District, drawn after the 1990 census, is constitutional.[23] Lower courts have applied the principles of these and prior Supreme Court rulings and determined that the creation of majority-minority districts under the Voting Rights Act is valid.[24]

In view of the affirmances in *Lawyer* and *King*, as well as the Supreme Court's repeated assurances that the use of race in drawing district lines does not automatically render districts unconstitutional, it appears evident that jurisdictions have a compelling justification for complying with the strictures of section 2 of the Voting Rights Act, and may be sufficiently race-conscious in redistricting to avoid diluting minority voting strength.

This term, the Supreme Court will again have an opportunity to provide further guidance on these issues, taking for review *Cromartie v. Hunt*.[25] *Cromartie* challenges the new Twelfth and First Congressional districts, drawn after the Court struck the old Twelfth in *Shaw v. Hunt*. The new Twelfth was only 47% African American, reduced from the original 53% minority district that the Supreme Court struck down in *Shaw v. Hunt*. *Cromartie* will give the Supreme Court perhaps its final opportunity prior to the 2000 census to clarify its original *Shaw* ruling and to further develop the limits for redrawing districts found to be unconstitutional under the *Shaw* standard.

Over the past two years, the U.S. Department of Justice has intervened in some of these *Shaw* challenges and has been named as a defendant in several of them.[26] The Department's involvement in these cases has had an impact on its enforcement record. A number of federal court decisions in recent years have been harshly critical of the Department's section 5 enforcement policies.[27] Also, in a number of cases, lawyers for the plaintiffs who are challenging the majority-minority districts have successfully sought to take the depositions of the Department's Voting Section personnel, and even of the Assistant Attorney General of the Civil Rights Division, concerning the Department's decision-making process in section 5 preclearance determinations. These inquiries are often time-consuming and demoralizing for the Civil Rights Division and Voting Section staff. Moreover, these probes have threatened the confidentiality between Department staff and the outside community that has been a hallmark of the Division's ability to gather information for, and execute its responsibilities under, the section 5 preclearance process.

Despite these obstacles, the Division must continue to intervene in these challenges. Defense of these challenges has borne fruit not only in ultimate victories, but also in the successful settlement of cases and redrawing of districts that still provide minorities an equal opportunity to elect candidates of choice. In this regard, *Lawyer*, in which the Department was a party-defendant, is instructive, for the presence of the Department at settlement negotiations and on appeal was an important part of the success of that case. As a party, the Department is in a position to instruct courts directly about its enforcement role, as well as shape settlements and court decisions.

However, while defense of challenged majority-minority districts is an important priority, it is equally important for the Voting Section to employ its substantial personnel and resources in bringing affirmative cases under section 2 of the Voting Rights Act. As discussed above, section 2 is recognized by the Supreme Court to be constitutional, and jurisdictions have a responsibility to comply with its strictures; in other words, the *Shaw* line of cases has not erected a bar to section 2 lawsuits.[28] Thus, the Voting Section must invigorate its program of investigating and filing cases under the Act. A proactive and vigorous strategy for bringing cases under section 2 will help bolster the credibility of the Department and the Voting Rights Act's validity before the courts and before otherwise recalcitrant jurisdictions. The Department must become a leader in this important effort, as it is critical for courts and jurisdictions alike to understand that section 2 compliance is still required and that the Department will hold jurisdictions accountable for any discrimination against minority voters during the next redistricting process.

Also, since census data is essential in the redistricting process, this Administration's decision to permit individuals to designate multiple racial and ethnic categories on the 2000 census forms presents particular issues for the post-2000 redistricting process. In order to ensure an accurate count of individuals during redistricting and reapportionment, it will be critically important to report these multiple categories in a format that is useful for enforcing civil rights law and creating redistricting plans. The Department will need to take the lead in coordinating this Administration's efforts to determine and implement the methods for tabulating and reporting the census data collected, and to ensure consistent enforcement and compliance across the agencies that use this data.

II. Enforcing Section 5 of the Voting Rights Act

Confronted with "unremitting and ingenious defiance of the Constitution,"[29] Congress enacted the Voting Rights Act of 1965 to "banish the blight of racial discrimination in voting,"[30] concluding that "the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."[31] The Voting Rights Act and, specifically, section 5 of the Voting Rights Act, represents the culmination of Congress's efforts to establish these new remedies designed to "rid the country of racial discrimination in voting."[32]

Section 5 prohibits the enforcement or administration by covered jurisdictions of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first receiving preclearance from the United States Attorney General or the United States District Court for the District of Columbia.[33] Covered jurisdictions can meet this burden by showing that the voting change is not tainted, even in part, by an invidious racial purpose[34] and will not have a retrogressive effect.[35] For several reasons, including cost and convenience, jurisdictions tend to seek preclearance through the administrative process conducted by the Department of Justice, rather than through litigation in the district court. Therefore, the Department has a unique, critical role in preventing the implementation of discriminatory electoral practices. The Administration, however, must confront several issues related to its section 5 enforcement responsibilities.

First, the district court decision in *Bossier Parish v. Reno*[36] threatens to significantly alter the fundamental standard for reviewing voting changes submitted pursuant to section 5. The Supreme Court in *Village of Arlington Heights v. Metro Housing Development Corp.* held that the assessment of whether purposeful discrimination was a motivating consideration "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[37] The Supreme Court also identified several factors that may provide evidence of invidious purpose in the context of official action taken by governing officials, including: (1) the historical background of the decision; (2) the sequence of events leading up to the action taken; (3) procedural departures from the normal process; (4) substantive departures from the normal process; and (5) the legislative or administrative history, including contemporary statements by the members of the governing body, minutes of their meetings, and any testimony by the decision-makers regarding their intent.[38]

In the first *Bossier* decision, however, a sharply divided three-judge district court granted preclearance to the Bossier Parish, Louisiana, school board redistricting plan, holding that circumstantial evidence of discriminatory intent may not be considered in a section 5 proceeding if such evidence would also be admissible in a proceeding under section 2 of the Voting Rights Act.[39] In a vigorous dissent, District Judge Gladys Kessler pointed out that the majority's standards for determining discriminatory intent departed sharply from Supreme Court precedents such as *Arlington Heights*, and stated that the record "demonstrates overwhelmingly that the School Board's decision . . . was motivated by discriminatory purpose."[40] The district court also refused to apply a

Justice Department regulation under which section 5 preclearance would be denied if a voting change would constitute a clear violation of the "results" test of section 2 of the Voting Rights Act.[41]

On appeal, the Supreme Court upheld the district court's unanimous conclusion that a section 2 violation could not be an independent justification for a denial of preclearance under section 5.[42] However, the Court remanded, instructing the lower court to apply the standard set out in *Arlington Heights* to the evidence of discriminatory purpose in the record, and directing the district court to consider the parish's argument that section 5's discriminatory purpose prong was limited to voting changes adopted with an intent to retrogress, and did not extend to a more general intent to limit minority voting strength.[43] On remand, the district court panel did not address the question of the scope of section 5's purpose prong. It applied the *Arlington Heights* standard only to the issue of whether the parish intended to retrogress when it made the decision to adopt the redistricting plan, with a majority of the court determining that the parish did not intend to retrogress.[44] The case is again pending before the Supreme Court on appeal.

Following the initial Supreme Court ruling in *Bossier*, the Department of Justice made a change in its regulations governing the section 5 administrative process. This change removed the provision authorizing the Department to deny section 5 preclearance if a voting change would constitute a clear violation of the "results" test of section 2 of the Voting Rights Act.[45] It is thus critically important that the Department be prepared to bring affirmative section 2 lawsuits against jurisdictions whose voting changes may not violate section 5's purpose or effect prongs, but nevertheless violate section 2. In addition, depending upon the outcome of the *Bossier Parish* case in the Supreme Court, the Department may have to determine how it will further modify its method of evaluating voting changes under section 5.

Second, the Supreme Court's decisions in the *Shaw* line of cases present certain challenges to the Department's section 5 enforcement. Specifically, the Department must evaluate its section 5 decision-making process in light of these rulings to determine if further guidance should be provided to submitting jurisdictions. For example, the Department will have to determine how it will respond to a redistricting submission in which members of the community have alleged that the plan violates the standard set out in *Shaw* and subsequent cases.[46] Similarly, the Department will have to prepare for the possibility that a jurisdiction itself will use compliance with the *Shaw* standard as a reason for seeking to implement a redistricting plan that other evidence indicates was adopted with the intent to discriminate against minority voters or would have a discriminatory effect against minority voting rights.

In addressing these and other issues regarding section 5 law enforcement, the Department should be aware of several concerns. First, current regulations, policy directives, and administrative decision precedents already accommodate these various contingencies, obviating the need for any changes in formal policy. It is understandable that the Department is sensitive to the critiques of its policies leveled by the courts and may wish to be responsive to changes in the law. Nevertheless, the Department should seek other methods to assure the courts and covered jurisdictions that it is complying with the governing laws, short of radical changes to its section 5 regulations or procedures that could have the unintended result of weakening section 5 enforcement.

Second, in addressing these and any other issues, the Department should consult the stakeholders in the section 5 process, including the minority voters whom the process is intended to protect.[47] Timely input from all parties with a stake in the section 5 process will not only help ensure that the purposes of the process are preserved, but will also enhance the credibility of the process with those groups.

III. Enforcement of the National Voter Registration Act

A. Responding to Legislative Attacks on the National Voter Registration Act, and the Erection of Electoral Barriers and Voter Intimidation

The National Voter Registration Act is approaching its fifth anniversary. It has been enormously successful in enlarging the pool of voters by requiring states to provide voter registration materials in a variety of offices providing various public services, such as drivers' licenses, public assistance, and services to the disabled. Indeed, the Federal Election Commission, the agency charged with reporting the impact of the NVRA on the administration of elections, reports that in 1996, more than 27 million people were registered to vote pursuant to the statute.[48] Specifically, the Federal Election Commission (FEC) noted that "[t]he mail registration provisions of the NVRA [under which voters are permitted to register to vote by mail] caused very few problems for the States and accounted for nearly one third of all voter registration applications from 1995 through 1996."[49] Despite the success and the relative ease in implementing the statute, there have been legislative attempts over the years to amend the NVRA to remove many of the features that have made it most successful. The most recent iteration of these efforts occurred during the last Congress.

At the beginning of the 105th Congress, California Congresswoman Loretta Sanchez's electoral victory was challenged in the House by former Representative Robert Dornan, whom she defeated. At the heart of the former Congressman's challenge were allegations that noncitizens had voted in the election and had provided the margin for victory in the race. In the wake of these allegations of vote fraud and the subsequent House investigations into them, the House considered several bills—termed "ballot security" measures—which, while purportedly designed to address issues regarding vote fraud, actually threatened to undermine or effectively to repeal provisions of the NVRA and, ultimately, the Voting Rights Act.

Beginning in 1997, the House first considered H.R. 1428, which would have established a federal program to "confirm" the citizenship of registered voters and voter registration applicants at the discretion of state or local election officials, allowing them to drop registered voters from the rolls and reject registration applications if their citizenship could not be confirmed. Under the bill, the local registrars were given the discretion to use the databases of the Social Security Administration (SSA) and the Immigration and Naturalization Service (INS) to confirm the citizenship status of would-be and current registrants. However, at the June 25, 1997, hearing before the House Judiciary Subcommittee on Immigration and Claims, both agencies testified that it was not possible to verify a person's citizenship using either agency's database.[50] The bill was defeated in February 1998.

Proponents of NVRA amendments next made several failed attempts to incorporate these amendments into various campaign finance proposals. First, before the 1998 Easter recess, the House considered and defeated a "campaign finance reform" bill, H.R. 3485, which incorporated the language of H.R. 1428. Second, the House considered a new campaign reform bill, H.R. 2183, and permitted members to offer a number of amendments to the legislation, including amendments: (1) eliminating the Voting Rights Act requirement that jurisdictions provide bilingual voting materials and bilingual assistance;[51] (2) establishing, similar to H.R. 1428, a federal pilot program to allow state and local election officials to "verify" citizenship of voters in, "at a minimum," California, Texas, Florida, New York, and Illinois, by using INS and SSA data; and (3) repealing the NVRA's mail-in registration requirement, requiring proof of citizenship and Social Security numbers to register to vote, allowing states to purge voters from the rolls for nonvoting, and permitting states to require photo identification at the polls.

Of course, these amendments had nothing to do with campaign finance. They were introduced without any congressional findings or proof of *any*, let alone any widespread, fraud or problems with the

NVRA procedures. Significantly, where there have been allegations of fraud in an electoral process, the existing system—under state *and* federal law—has operated to address the complaints and adjudicate the matters.[52]

Rather than addressing vote fraud, these proposals posed serious threats to the voting rights of all Americans. Requiring "proof of citizenship to register or to vote" and requiring photo identification would have a disparate impact on low-income citizens who are disproportionately racial minorities, as they would be forced to purchase documents to prove identity and citizenship in order to vote, tantamount to a poll tax.[53] Moreover, repealing the mail-in registration would undermine the NVRA. The FEC Report indicated that approximately 27 million people had registered under the NVRA, with more than 12 million registering through mail-in.[54] If enacted, these bills would have eroded protections guaranteed by the NVRA and the Voting Rights Act, erecting additional, unnecessary barriers and hurdles to voter registration that, in principle, the NVRA was designed to eliminate, and against which the Voting Rights Act was designed to protect.

We should expect similar measures to be introduced as bills or amendments in Congress in the coming years. As in past debates over these issues, the Department of Justice and other agencies should continue to advise Congress that the federal government does not have the ability to create data systems that would facilitate these various proposals. In addition, the Department should point out the potential for discrimination raised by proposals such as the ones discussed, particularly by those that would eliminate the Voting Rights Act's bilingual provisions or erect barriers at the polls that would render the provisions of the NVRA a nullity. It will be critical not only to defeat such proposals in the future, but also to ensure such an overwhelming defeat that the proponents of these measures do not continue to reintroduce them and states and private parties are not further empowered to replicate these measures locally.

Through its legislative advocacy and the section 5 process, the Department of Justice must continue to be vigilant and work to prohibit the implementation of electoral requirements that would intimidate or disproportionately impact the electoral participation of minority voters, such as requiring the presentation of photo identification at the polls. In addition, through its election monitoring, the Department should work to preempt intimidation in the electoral process. Even before specific complaints and allegations are lodged, the Department should investigate areas with a prior history of discriminatory or intimidating electoral practices. When allegations of intimidating activity are presented, the Department must act *promptly* and *systematically* to investigate allegations and then act aggressively to preempt the intimidation by instructing private and public parties that the intimidating behavior constitutes a violation of the Voting Rights Act. Finally, if necessary, the Department must in due course litigate to prevent or cause the cessation of voter intimidation, integrating this litigation strategy into its process of pre-election investigation and its federal observer program. While the Department currently conducts pre-election investigations and sends federal observers when specific allegations are raised, the threshold for Department intervention tends to be quite high. A lower threshold would permit the Department to intervene earlier and preempt discriminatory activity, perhaps even obviating the need for further federal involvement.

B. The Next Generation of NVRA Litigation and the Need to Expand Agency Coverage

At this stage of the NVRA's enforcement, most questions concerning the statute's constitutionality have been resolved and lawsuits against states that had simply refused to comply with the NVRA have been successfully concluded.[55] However, enforcement of the NVRA in public assistance agencies and disability benefits offices in many states has been much less systematic than its enforcement at drivers' license bureaus. It is thus still necessary to pursue aggressively the remaining jurisdictions that have failed to designate the broad spectrum of agencies necessary to provide all the voter registration opportunities contemplated by the NVRA. This should be a priority for the Voting Section, requiring a next generation of NVRA lawsuits to ensure that where the NVRA has been implemented, states are complying with the strictures of the law fully and fairly, particularly in public assistance and disability agencies. It is essential, therefore, for the Department of Justice to conduct ongoing investigations of NVRA compliance nationwide, including the development of a comprehensive strategy for the extensive and thorough collection of data concerning NVRA implementation in the state agencies.[56]

In addition, as a result of welfare law changes, many public assistance recipients may not currently be offered the chance to register to vote which the NVRA offers. Many states are adopting programs under which prior AFDC (Aid to Families with Dependent Children)[57] recipients are diverted from the new Temporary Assistance to Needy Families (TANF)[58] program to job training and job service programs. These diverted individuals may not be provided opportunities to register to vote pursuant to the NVRA during this process. As the principal NVRA law enforcer, the Department of Justice should take the lead in researching and collecting data on the effects of these diversion programs and on voter registration. The Department should also coordinate with other agencies, such as the Department of Health and Human Services, to ensure that state agencies are still fulfilling their obligations under the NVRA.

IV. Conclusion

In order to facilitate the sharing of information and views, the Department should consider establishing formal working groups composed of Department personnel and members of the voting rights advocacy community and holding periodic meetings to discuss issues of concern. Such working groups could help to foster trust between the community and the Department on these issues and help everyone stay informed of policy changes and trends. They also would provide an informal means for the community to share ideas and give feedback to the Department.

The Voting Rights Act and the NVRA are the primary statutes that guarantee the voting rights of this country's citizens. As the principal agency charged with enforcing them, the Department of Justice stands at the intersection of these statutes, ensuring that these rights continue to be protected in the face of a changing legal and legislative landscape. The strategies which this Administration develops to address the new issues confronting voting rights law will shape the future of the government's voting rights enforcement and impact minority voting rights in the next century.

Endnotes

[1] The gains in minority representation resulting from the redistricting following the 1990 census were dramatic. For example, prior to 1990, there were still five southern states with substantial African American populations which had not elected a single African American to Congress since the end of Reconstruction: Alabama, Florida, North Carolina, South Carolina, and Virginia. In 1992, those five states elected eight African Americans to Congress because each of those states for the first time created one or more majority African American congressional districts. Overall, African American representation in the House of Representatives increased from 26 in 1991, prior to redistricting, to 39 in 1992, following redistricting.

[2] 42 U.S.C. § 1973, *et seq.*

[3] 42 U.S.C. § 1973gg, *et seq.*

[4] 42 U.S.C. § 1973, as amended.

[5] 42 U.S.C. § 1973c.

[6] 509 U.S. 630 (1993).

[7] 515 U.S. 906 (1995).

[8] 517 U.S. 899 (1996).

[9] 517 U.S. 952 (1996).

[10] In the original 1993 *Shaw v. Reno* decision, the Court did not address the constitutionality of the challenged districts; the Court addressed only whether the plaintiffs had a cause of action to challenge the districts under the Constitution.

[11] In *Shaw*, however, the Court ruled the plaintiffs in the case did not have standing to challenge the First Congressional district and, therefore, the Court did not decide the constitutionality of that district.

[12] *Bush*, 517 U.S. at 958 (citations omitted).

[13] *Id.* at 993. (O'Connor, J., concurring) (emphasis in original). See also *United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw*. . . that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original).

[14] Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, prohibits any practice that has the intent or result of denying a citizen of the United States the right to vote on account of race, color, or status as a language minority. Section 2 states in pertinent part:

> *Sec. 2(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as set forth in subsection (b).*
>
> *(b) A violaiion of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by a class of other citizens protected by subdivision (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .*

[15] *Id.* at 992 (O'Connor, J., concurring).

[16] *Id.* at 991-992 (O'Connor, J., concurring).

[17] *Id.* Justice O'Connor's opinion on this issue is particularly important given that four other members of the

Court, who dissented from the rulings striking down the North Carolina and Texas plans, clearly agree that states have a compelling interest in avoiding diluting minority voting strength and in complying with section 2 of the Voting Rights Act. See *Bush*, 517 U.S. at 1003, 1011 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1045, 1050-51 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

[18] See also *Lawyer v. Department of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997) (upholding the constitutionality of a Florida state legislative districting plan that was drawn with conscious consideration of race to settle litigation challenging a prior plan, creating a majority-minority district that afforded minority voters the opportunity to elect candidates of their choice that was somewhat irregularly shaped and that split county and city boundaries); *Abrams v. Johnson*, 521 U.S. 74 (1997) (approving congressional districting plan for Georgia having majority-black district); *King v. State Board of Elections*, __ U.S. __ , 118 S. Ct. 877 (1998) (*per curiam*) (summarily affirming district court ruling upholding the constitutionality of Illinois' Fourth Congressional District); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413-14 (E.D. Cal. 1994) (finding that intentional creation of majority-minority districts does not violate Constitution when redistricting plan "evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process"), *aff'd*, 515 U.S. 1170 (1995).

[19] 521 U.S. 567, 117 S. Ct. 2186 (1997).

[20] *Scott v. United States*, 920 F. Supp. 1248, 1255 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997).

[21] *Id.* at 1256.

[22] See *Lawyer*, 117 S. Ct. at 2195.

[23] *King v. State Bd. of Elections*, __ U.S. __, 118 S.Ct. 877 (1998). See also *Abrams v. Johnson*, __ U.S. __, 117 S. Ct. 1925 (1997) (upholding the constitutionality of a Georgia district court's decision to maintain one urban majority-black congressional district and to eliminate two nonurban majority black districts).

[24] See *Clark v. Calhoun County, Mississippi*, 88 F.3d 1393, 1407 (5th Cir. 1996) (the Supreme Court in its recent decisions did not alter the *Gingles* proof, nor did the "Court suggest that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test [for majority-minority districts]"); *Cane v. Worcester County*, 35 F.3d 921, 926-27 n.6 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 3616 (1995) (holding that *Shaw* is not implicated in section 2 challenge to at-large election scheme where proposed majority-black remedial district was comparable to other election districts drawn by the county); *Addy v. Newton County, Mississippi*, 2 F. Supp. 2d 861 (1997) (dismissal of Fourteenth Amendment challenge to majority-minority district created to remedy section 2 violation).

[25] *Cromartie v. Hunt*, No. 4:96CV104-BO(3) (E.D.N.C. April 14, 1997), *prob. juris. noted*, 119 S. Ct. 28 (1998).

[26] See, e.g., *Hays v. State of Louisiana*, 936 F. Supp. 360 (W.D. La. 1996); *Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997).

[27] See, e.g., *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996); *Johnson v. Miller*, 863 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 115 S.Ct. 2475 (1995).

[28] See *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998), *cert. denied*, 118 S. Ct. 2372 (1998); *Johnson v. Hamrick*, 1998 WL 476186 (N.D. Ga. June 12, 1998); *Goosby v. Town of Hempstead*, 956 F. Supp. 326 (E.D.N.Y. 1997).

[29] *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1986).

[30] *Id.* at 308.

[31] *Id.* at 309.

[32] See *id.* at 315.

[33] 42 U.S.C. § 1973c. Section 5 reads in pertinent part:

> *Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.*

[34] See *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975); *City of Rome v. United States*, 422 U.S. 156, 172 (1980); *Busbee v. Smith*, 549 F. Supp. 494, 516-517 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *Wilkes County v. United States*, 450 F. Supp. 1171, 1177 (D.D.C. 1978).

[35] See *Beer v. United States*, 425 U.S. 130, 140-142 (1976); 28 C.F.R. § 51.54.

[36] 7 F. Supp. 2d 29 (D.D.C. 1998).

[37] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

[38] *Arlington Heights*, 429 U.S. at 267-68.

[39] *Bossier Parish School Board v. Reno*, 907 F. Supp. 434 (D.D.C. 1995).

[40] *Id.* at 463.

[41] *Id.* at 442.

[42] *Reno v. Bossier Parrish School Board*, 520 U.S. __ , 117 S. Ct. 1491 (1997).

[43] *Id.* at 1494.

[44] *Bossier Parish School Board v. Reno*, 7 F. Supp. 2d 29 (D.D.C. 1998).

[45] Effective May 1, 1998, the Attorney General amended the Procedures for the Administration of section 5 of the Voting Rights Act of 1965, deleting paragraph (b)(2) of 28 C.F.R. § 51.55.

[46] Similar issues would be raised, during the course of litigation, when a jurisdiction submits a redistricting plan that is challenged under the *Shaw* standard.

[47] In a speech to the National Conference of State Legislatures Annual Meeting in 1997, Acting Assistant Attorney General for the Civil Rights Division Isabelle Katz Pinzler spoke of the Department's deep concern over the criticism of the Department's policies in *Shaw* and *Miller*, and that as a result of developments in redistricting and section 5 law, the Department was beginning the process of studying whether the guidelines governing its section 5 administrative process needed to be revised. Subsequently, the Department has met with officials from jurisdictions covered by section 5 to discuss the section 5 process and possible changes to the current administrative guidelines.

[48] Federal Election Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 1995-1996, a Report to the 105th Congress*, 27.

[49] *Id.* at 1.

[50] Statement of David W. Ogden, Associate Deputy Attorney General, before the Subcommittee on Immigration and Claims, Committee on the Judiciary, United States House of Representatives, concerning H.R. 1428 Voter Eligibility Verification Act, at 4-8 (June 25, 1997) ("DOJ Testimony"); Statement by Sandy Crank, Associate Com-

missioner for Policy and Planning, before the House Judiciary Subcommittee on Immigration and Claims, at 1-3 (June 25, 1997).

[51] This amendment mirrored earlier attempts to remove this provision. See H.B. 351, 104th Congress, 1st Session (introduced Jan. 9, 1995).

[52] In particular, there is no evidence that the registration and voting of noncitizens, a concern that the citizenship confirmation process was purportedly designed to address, is a significant or widespread national problem. For example, a Grand Jury convened in Orange County to investigate allegations that noncitizens had illegally registered to vote in the Dornan/Sanchez 46th Congressional District election refused to return indictments against anyone.

[53] See, e.g., Statement of Becky Cain, President, League of Women Voters of the United States, before the House Judiciary Subcommittee on Immigration and Claims, at 2 (June 25, 1997); DOJ Testimony, *supra* note 50, at 8-9.

[54] Federal Election Commission, *supra* note 48, at 27.

[55] See, e.g., *Association of Community Organization for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995).

[56] Of course, these strategies will be developed in the context of the district court decision in *United States v. State of New York*, 3 F. Supp. 2d 298 (E.D.N.Y. 1998), holding that New York was not required by the NVRA to designate public and private hospitals, nursing homes, and community-based organizations that process Medicaid applications as voter registration agencies.

[57] 42 U.S.C. § 601.

[58] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, 110 Stat. 2105, 2110.

Chapter X

The Civil Rights Impact of Recent Welfare Changes

by Jocelyn C. Frye and Su Sie Ju[1]

Introduction

In 1996, with the passage of a new welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[2] we asked the question whether the drive to "end welfare as we know it" would build bridges or barriers to the goal of escaping poverty.[3] Two years later, there is much evidence of rapidly declining caseloads,[4] but still very few answers to the fundamental question of whether the PRWORA "reforms" have enabled low-income families to move out of poverty and achieve financial independence. Beyond caseload statistics, little is known about what is really happening to welfare recipients and low-income families teetering on the economic margins.[5] Unfortunately, efforts to determine the answers to these tougher questions have been overshadowed by the rush to trumpet the "success" of welfare reform.

This chapter focuses specifically on the civil rights impact of recent welfare changes on welfare recipients (and low-income individuals who interact with welfare programs) and discusses the steps that the Clinton Administration has taken or should take to address these issues. Securing civil rights protections for welfare recipients is one critical piece of a broader, fundamental goal: to remove the full range of barriers that limit employment and educational opportunities for welfare participants and to facilitate their efforts to achieve economic security.

I. Understanding the Context: Why Civil Rights Protections for Welfare Recipients Are Important

A. Background: The New World of Welfare

On August 22, 1996, President Clinton signed the PRWORA and, in so doing, drastically changed the system for providing benefits to families in need. The law eliminated the 60-year-old federal guarantee of assistance and gave states extraordinary flexibility to draft their own welfare programs. Even before the passage of the welfare law, states were using waivers[6] to refashion existing programs and experiment with new program strategies. But the PRWORA placed new emphasis on entering the workforce as soon as possible, imposing rigorous new work participation requirements on recipients and states.[7] This "work first" philosophy, a cornerstone of the welfare law, stressed getting a job—any job—quickly, regardless of pay or benefits or advancement opportunities.[8]

The mandate to move welfare recipients rapidly into the workforce has led to a transformation of many welfare offices and the role of caseworkers. With the stricter requirements of the PRWORA, many caseworkers now face pressure to push clients to take whatever jobs they can find and send a clear message that clients must work or risk losing benefits. The overall emphasis is to leave welfare quickly, make welfare a temporary solution if at all, and even discourage individuals from seeking benefits in the first place.[9] Ironically, however, the debate on these changes to the federal welfare law yielded inadequate discussion about the long-standing barriers that limit employment opportunities for many welfare recipients and impede their ability to move permanently from welfare to work.

B. Barriers to Employment and Their Civil Rights Implications

Notwithstanding the "work first" mantra repeated throughout the welfare debate, the suggestion that welfare recipients go to work was not a new idea. Indeed, prior to the passage of the welfare law, many women who received welfare benefits either were working, had worked, or were looking for work.[10] But participants often cycled on and off welfare, leaving a job when a family emergency arose or when their wages were too low to support their family. These cyclical patterns revealed a more fundamental problem: many participants were encountering difficulties finding or keeping a job because of specific barriers that hindered their ability to stay employed. Participants, for example, often faced barriers on the front end when looking for work because their skills did not match the available jobs or because of discriminatory attitudes about their abilities.[11] Others faced barriers to being "job-ready" because they lacked specific skills or levels of education. For others, the absence of critical support services—such as child care, transportation, programs to deal with specific health problems including substance abuse and depression,[12] counseling services for domestic violence[13] or other problems, and programs on life skills and strategies for balancing work and family—posed insurmountable barriers to keeping a job. Even after becoming employed, many participants confronted barriers in the workplace, such as on-the-job discrimination, lack of benefits, unfamiliarity with workplace practices, and no protections for dealing with family emergencies like caring for a sick child or relative—all barriers that made it difficult to remain in a job for a long period of time.

The PRWORA, unfortunately, did little to acknowledge or address these employment barriers. Indeed, rather than diminish their impact, the PRWORA in some cases exacerbated them. For example, the law limits the ability of participants to acquire additional education and training, even though such efforts can significantly increase participants' chances of finding higher wage jobs that offer some financial security.[14] And because of the strict work participation requirements, many states have imposed strong sanctions on participants who miss work or do not comply with a rule, regardless of the cause.[15] The PRWORA's failure to address many of these employment barriers, however, means that many welfare participants will continue to grapple with these problems as they search for jobs with decent wages.

Some of the employment barriers facing welfare participants can be addressed at a personal level, for example, through programs on life skills and time management. But other employment barriers—such as lack of transportation or child care, or discrimination—are systemic problems over which clients have little if any control. Several of these systemic barriers have civil rights implications. For example:

- Are clients losing out on job opportunities because of race- and/or gender-based stereotypes about their abilities?

- Are clients who lose a job due to discrimination or the need to care for a sick child still subject to sanctions and reduced benefits?

- Are clients with limited English proficiency able to get information in their native languages about new work requirements and changes in welfare rules?

- Are disabled clients shut out of potential jobs because their disability has not been detected or accommodated?

- Are clients assigned to workfare jobs and paid less than the minimum wage?

- Are clients exposed to unsafe working conditions?

- Are ethnic minorities required to provide additional work authorization materials, even though they have already provided legally valid papers?

- Are clients being sexually harassed on the job?

- Are urban communities that are disproportionately poor and minority receiving fewer services and subject to different rules than other communities?

All of these questions, as well as many others, raise concerns about the civil rights implications of PRWORA reforms. Left unchecked, these barriers could undermine participants' efforts to find permanent employment.

C. Civil Rights Questions Raised by the Restructuring of Welfare Programs

The workplace/civil rights issues mentioned above are but a few of the civil rights concerns raised by recent welfare changes. Under the PRWORA, states receive Temporary Assistance for Needy Families (TANF) funds through large block grants that give states extensive flexibility to craft welfare programs. But this new flexibility also raises questions about the potential civil rights impact of restructured programs and newly crafted policies. Close monitoring of state practices is critical to ensure that program changes do not infringe upon important civil rights protections. As states have begun to restructure and implement their welfare programs, several changes have occurred that already demand close scrutiny.

Recent data analyses, for example, have revealed that welfare caseloads now have larger proportions of minority clients than ever before and increasingly are concentrated in large urban areas that typically have higher concentrations of minorities.[16] While welfare caseloads are declining for all demographic groups, in most states the rate of decline is slower for African Americans and Hispanics than for white recipients.[17] And in several communities, the slowest rates of decline are among Hispanic clients, many of whom may have language barriers that further complicate their efforts to leave welfare.[18] The disparities in the rates of decline may suggest that minority populations are encountering more problems and barriers than non-minorities when trying to exit welfare programs. At a minimum, such disparities raise questions about whether various changes in welfare rules are having uneven effects. And the growing concentration of welfare caseloads in some large urban areas only heightens concerns that certain communities may be further marginalized and receive lesser services.

In addition to these demographic shifts, the impact of recent welfare changes on disabled individuals and ethnic minorities, particularly those with language barriers, also demands attention. Prior to the passage of the PRWORA, for example, one study found that 16% to 20% of women receiving AFDC reported one or more disabilities that limited the work that they could do.[19] Such statistics make clear the importance of detecting an individual's disability early in the initial assessment process and working with the client to determine the types of accommodations that may be required for a particular job placement. Ethnic minorities, particularly individuals with limited English proficiency, also face new challenges with the newly restructured welfare programs.[20] The PRWORA contained harsh provisions targeted at legal immigrants, some of which were later rescinded or modified. But ethnic minority clients may continue to be targeted for exclusion from certain programs or services, and the push to find jobs quickly may pose unique problems for individuals with language barriers. This means that state programs must be monitored carefully to ensure that ethnic minorities are treated fairly, are offered the same program options as nonethnic minority clients, and where appropriate, are given access to information in other languages.

The changes in the welfare law and the impact of these changes on civil rights raise questions about how to ensure effective civil rights enforcement. The law contemplates a diminished federal role and increased state flexibility. But expanded flexibility, absent careful scrutiny, can lead to less accountability, arbitrary action, and unfair treatment. Even with the shift of more responsibility from the federal to the state level, both the federal government and the states remain obligated to comply with anti-discrimination and other civil rights laws, including labor and employment laws. And these laws, when enforced, can offer critical protections to welfare recipients for whom the consequences of discrimination and unfair treatment can be devastating. Securing civil rights protections is an essential strategy for ensuring that welfare recipients are treated fairly, are successful at work, and are able to get benefits when they need them.

II. Understanding the Law: Civil Rights Protections in Welfare Programs

There are a range of civil rights laws that can apply to welfare recipients or welfare programs,[21] and the PRWORA did not alter these civil rights laws or the obligations that they place on states and other entities.[22] The PRWORA does not mention the full variety of applicable civil rights laws,[23] but it does include some key provisions that acknowledge the importance of fair treatment and nondiscrimination in welfare programs. Specifically, the TANF section of the PRWORA includes these important provisions:[24]

- *Fair and Equitable Treatment.* TANF section 402, which describes the required components of state plans, requires states to "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment." This means that states should explain in their state plans how they will ensure that welfare recipients are treated fairly, and also how recipients can challenge unfair conduct.

- *Nondiscrimination.* TANF section 408(c) states that TANF-funded programs or activities are covered by the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964.[25]

- *Nondisplacement.* Although TANF section 407(f) states that participants can fill "vacant" jobs, it prohibits placement of participants in jobs where an individual is on layoff from the same or an equivalent job, or where the employer has terminated an employee (or otherwise reduced its workforce) with the intention of filling the position with a participant. This means that employers cannot lay off or terminate employees in order to replace them with welfare recipients whom they may be able to pay less. The law requires states to set up a grievance procedure to resolve complaints of nondisplacement violations. The law also makes clear that it does not preempt state or local laws that provide stronger nondisplacement protections.

In addition, the Balanced Budget Act of 1997 (BBA) amended the PRWORA by allocating specific funds for a new Welfare-to-Work (WtW) Initiative. The BBA includes several important worker protections for participants in programs specifically funded through the WtW Initiative:

- *Nondisplacement.* This provision provides participants with the same protections that are available under the TANF nondisplacement provision (see above). But this provision also provides some additional protection: it prohibits participants from participating in work activities that violate an employer's existing labor contract(s) or collective bargaining agreement(s), and it prohibits employers from involuntarily reducing the hours of full-time employees and placing participants in the same or equivalent jobs. This means that employers cannot use program participants as an excuse to violate labor contracts, nor can they reduce the hours of their full-time workers and replace them with participants.

- *Health and Safety.* This provision states that the federal and state health and safety standards that apply to the working conditions of employees shall also apply to program participants.

- *Nondiscrimination.* This provision specifically prohibits gender-based discrimination in WtW-funded work activities. This means that participants are protected against sex discrimination, like sexual harassment, in work activities.

- *Nonpreemption.* This provision makes clear that the BBA has no effect on state laws that provide stronger worker protections. If a state law's worker protections are better than those in the BBA, then employees/participants can use those greater protections.

- *Grievance Process.* This provision requires states to set up grievance procedures for employees and participants to file complaints and have an opportunity for a hearing when worker protection violations occur. The provision is stronger than the TANF grievance procedure because it includes a list of possible remedies for violations and requires states to set up an appeals process. States also are required to identify an independent state agency (other than the state or local agency that administers WtW-funded programs) to hear appeals.

The BBA amendments are particularly significant not only because they included the WtW worker protections described above, but also because they did *not* include specific provisions designed to strip welfare recipients of civil rights protections.[26] The BBA also loosened some of the PRWORA's restrictions targeted at immigrant communities by changing the rules governing SSI eligibility for legal immigrants. The BBA restored SSI and Medicaid benefits to legal immigrants in the country already receiving assistance as of August 22, 1996, and provided these benefits to legal immigrants in the country as of that date who become disabled in the future. The law extended the cutoff date of benefits for current recipients who no longer qualify for SSI under the new rules, from September 30, 1997 to September 30, 1998. And the BBA extended from five years to seven years the PRWORA's exemption of refugees and asylees from the restrictions against receipt of SSI and Medicaid benefits.

There also have been more recent legislative efforts to address other employment barriers of particular importance to underserved communities:

- *Improving Transportation Options.* The federal transportation bill, the Transportation Efficiency Act of the 21st Century (TEA-21) that passed in June 1998, earmarked funds for projects to ease transportation problems facing welfare recipients and low-income individuals. TEA-21 authorized up to $750 million[27] over five years to make grants for access to jobs and reverse commute projects[28] that offer strategies for expanding transportation options for low-income workers.

- *Expanding Access to Education and Training.* The Senate version of the higher education bill included an amendment to the PRWORA, sponsored by Senator Wellstone, to expand from 12 to 24 months the time limit for participation in vocational education training.[29] The amendment also would have excluded teen parents from the 30% vocational education cap and allowed post-secondary education to count toward the work requirement. Although the amendment passed in the Senate, it was later removed during the final budget negotiations and replaced with a study to examine the effectiveness of educational approaches (including vocational and post-secondary education) and rapid employment approaches in assisting welfare recipients and other low-income adults obtain employment and attain economic self-sufficiency.[30]

This background provides the legal framework for a better understanding of what is really happening at the ground level. Trying to get a real picture of what is really happening takes on even more urgency as time limits are beginning to take effect in many states and the percentage of "harder-to-serve" clients increases. Without a clearer understanding of what is happening to welfare participants, policy changes will be made in a vacuum—and those changes risk marginalizing those who continue to receive benefits, eroding any public support for providing them with the kind of assistance they need.

III. A Status Check: Exploring the Civil Rights Impact of Recent Welfare Changes

Getting definitive answers to questions about the civil rights impact of welfare reform efforts is not easy. Indeed, even prior to the passage of the PRWORA, determining the scope of civil rights problems facing welfare recipients would have been a challenge, particularly in light of underreporting, matters often being handled informally or administratively, and ongoing concerns about underenforcement of key anti-discrimination laws.[41] Now, with new welfare laws and a myriad of state and local program variations, the influx of more welfare recipients into the workforce, and the risk of losing benefits if rules are not followed, finding out what is really happening at the ground level is even more challenging—and compelling.

In an effort to gain a better understanding of these real-world challenges, the National Partnership for Women & Families undertook a survey[42] of program providers who primarily work with low-income women as they look for jobs. The survey was not an attempt to evaluate a statistically representative sample for research purposes; rather, it was an effort to get a preliminary look at current realities and the types of barriers that, on a practical level, limit women's employment opportunities. The responses reaffirmed the data on barriers to employment discussed earlier: the top three barriers to employment identified by survey respondents were transportation (58% of survey respondents), child care (59% of survey respondents), and education and training needs (43% of survey respondents). But nearly 30% of the survey respondents also identified a wide range of civil rights issues—such as pay discrimination, family and medical leave problems, pregnancy discrimination, sexual harassment, and gender and racial stereotyping—as barriers that made it difficult for their clients to find jobs. Here are a few anecdotal examples:

- After getting thorough training in printing and graphic arts, a woman was turned down by an employer who said, "I need a man for this job."

- A young woman got a food service job but was soon cornered by a janitor and sexually harassed and propositioned. She informed management, but the men just laughed while telling the janitor not to do it again. He persisted until she finally quit.

- An employer told a job training and placement program that he never hires single parents because their attendance is poor.

- A commercial drivers license training program reported that a neighboring school district is known for refusing to hire black or Hispanic drivers.

These few anecdotes illustrate on a practical level some of the attitudes that many women and minorities may encounter as they look for work and demonstrate how discrimination barriers can limit job opportunities.

So what are states doing to ensure the fair treatment of welfare recipients striving to enter the workforce? As with other questions regarding the impact of welfare reform, there are few sources of information from which to extrapolate answers. State TANF plans contain few provisions outlining civil rights and workplace protections.[43] The significance of these omissions, however, is difficult to determine. Although section 402(a)(1)(B)(iii) of the PRWORA requires states to "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment," this statutory provision, absent specific guidance, has been interpreted broadly. In some cases, states have simply parroted back key words without further elaboration,[44] while other states have provided more detailed explanations.[45] The lack of consistency in the provisions of state TANF plans is a reflection of both a lack of guidance on how to interpret section 402(a)(1)(B)(iii), as well as the U.S. Department of Health and Human Services's (HHS) overall reluctance to rigorously evaluate the adequacy of states' varied responses to this section 402 requirement. As states renew their eligibility for receipt of TANF funds,[46] however, HHS should hold states accountable for explaining what steps they will take to ensure fair and equitable treatment in their welfare programs. Allowing states simply to quote back the statutory language without explanation renders the provision virtually meaningless.

An examination of state laws and regulations[37] juxtaposed against state actions reveals that states are sending mixed signals regarding their commitment to enforcing civil rights and workplace protections in their welfare reform programs. While some states have taken steps to further define the scope of some civil rights and workplace protections for welfare recipients, some of those same states remain intransigent in providing or adhering to other basic civil rights and workplace protections. In this regard, the experiences in California and New York are instructive. For example, California's emergency regulations to implement its welfare program provide that a "good cause" exemption for failure or refusal to comply with program requirements includes when "[t]he employment, offer of employment, activity, or other training for employment discriminates in terms of age, sex, race, religion, national origin, or physical or mental disability."[38] New York has determined that welfare workers are to be compensated at the federal or state minimum wage, whichever is higher.[39] Yet, while these actions in California and New York reflect, at minimum, an understanding of the need for civil rights and workplace protections, other actions by officials in these states suggest otherwise. For instance, California Governor Wilson's administration has severely limited the range of welfare-to-work activities protected by the Fair Labor Standards Act.[40] Likewise, in New York City, Mayor Giuliani proposed terminating nearly 1,000 incumbent workers from hospitals where, according to advocates, about the same number of the City's workfare participants had been placed to do virtually the same tasks as the incumbent workers threatened with layoffs.[41]

For the moment, advocacy and litigation appear to be the main vehicles for helping welfare recipients overcome barriers stemming from unfair treatment.[42] However, another critical component of enforcement is a careful study and monitoring of the demographics of families leaving and remaining on the welfare rolls, as well as state compliance with applicable laws. States are just beginning to acknowledge the extent to which their welfare caseloads consist of individuals with multiple or severe barriers to employment.[43] This recognition is an important first step. But, as states pursue various monitoring projects, the guidance of federal agencies, like HHS, is critical to ensure systematic collection of complete and comprehensive data.

While monitoring is a long-term endeavor, some civil rights problems could be quickly remedied or prevented through comprehensive training of state and local personnel who work directly with welfare recipients or are involved with other aspects of administering welfare programs. Furthermore, state and federal agencies should ensure that policies and procedures are established to deal effectively with complaints of discrimination, and that both welfare recipients and caseworkers are familiar with this complaint process.[44] This kind of education and training on a local level is important to ensuring the fair treatment of all welfare recipients seeking to enter employment.

IV. Where Do We Go From Here: Federal Agency Implementation Efforts and Recommendations for Action

A. Pending Regulatory Efforts

HHS is the primary federal agency responsible for overseeing states' implementation of their welfare programs under TANF, while the Department of Labor (DOL) has oversight of the Welfare-to-Work (WtW) grant program.[45] Each agency is responsible for, among other things, the development of regulations to govern administration of its program. As of this date, HHS has yet to issue final TANF regulations. However, proposed TANF regulations were published on November 20, 1997,[46] and are projected to be finalized by the end of the year. DOL issued its interim final WtW regulations on November 18, 1997.[47] The regulations reflect not only how the state TANF and WtW programs should be implemented, but the role each agency assumes in assisting states with the design and administration of their welfare programs.

1. TANF Regulations

The proposed TANF regulations reflect HHS's view that its enforcement power is severely constrained under the PRWORA. In the preamble to the proposed regulations, for example, HHS acknowledges that the PRWORA specifically provides that certain civil rights laws apply to any program or activity receiving TANF funds, but that "[s]ince ACF [Administration for Children and Families] is not responsible for administering these provisions of law, and they are not TANF provisions, this rulemaking does not include them."[48]

Even though section 417 of the PRWORA imposes limits on federal authority, federal agencies, like HHS, should not read that language so narrowly that they fail to take a proactive role in ensuring compliance with the PRWORA's nondiscrimination provision. HHS has existing civil rights enforcement obligations—and those obligations continue unchanged by the PRWORA. In contrast, DOL's interim final WtW regulations make clear that WtW participants "shall have such rights as are available under all applicable Federal, State and local laws prohibiting discrimination."[49] And both DOL and the Equal Employment Opportunity Commission (EEOC) have issued policy directives unequivocally stating that various federal employment and anti-discrimination laws, including those not specifically mentioned under the PRWORA, protect welfare recipients. These statements and guidance are extremely important to make clear that the anti-discrimination protections available under federal law have not been limited by the WtW provisions or the broader welfare law. HHS should make clear in its final regulations its role and responsibility for enforcement of the PRWORA's nondiscrimination provision.

2. Welfare-to-Work Regulations

Importantly, DOL has been strong and clear in its statements and guidance that basic federal workplace and anti-discrimination protections may apply to welfare recipients. The WtW regulations, however, should (either in the final rule or in policy guidance) clarify a few key points to ensure that worker protections cover the full range of WtW activities, that states comply with anti-discrimination laws, and that participants are informed about their legal options when challenging unfair treatment. More specifically:

- The WtW regulations should use a broader definition of "work activities" to ensure that worker protections cover the full range of permissible WtW activities in which welfare recipients may participate. The BBA's WtW worker protections extend to WtW-funded work activities, but the phrases "work activities" or "work activity" are undefined.[50] The WtW regulations define "work activity" narrowly, excluding allowable WtW activities related to employment, such as job placement activities and post-employment services.[51]

  A broader definition including these allowable WtW activities is necessary because discrimination and other worker protection violations may also occur in these activities. For example, female WtW participants may be steered into certain skills training programs[52] or excluded from others because of sex-based stereotypes; job placement firms may track women solely into clerical or lower paying jobs; supportive services may be distributed in a discriminatory manner; or participants may face sexual or racial harassment at any stage. These forms of discrimination with respect to participation in work activities can profoundly limit the work opportunities of WtW participants. Furthermore, a broader interpretation acknowledges that an individual may need a variety of services to transition into the workforce permanently. The PRWORA, for example, defines work activities more broadly, including (with some time limitations) job search and job readiness activities, job skills training directly related to employment, and vocational education training.[53]

- The WtW regulations should make clear that the gender discrimination language in the statute shall be interpreted consistently with other sex discrimination laws, namely Title VII and Title IX.[54] Given the persistence of sex discrimination in the workplace, it is essential to make clear that the same sort of conduct that is considered sex discrimination under Title VII and Title IX is also considered sex discrimination under the WtW statute.[55]

- The WtW regulations should make clear that participants with sex discrimination complaints may have a variety of legal options in pursuing their claims. In some cases, an alleged violation may be prohibited by the WtW statute's gender discrimination provision, and also prohibited by either Title VII or Title IX or a state law. The final regulations should state explicitly that participants have the option of pursuing their claims through the WtW grievance process or the procedures under other applicable sex discrimination laws.

- The WtW regulations should also require states to describe their state grievance procedures and explain how they will ensure that WtW participants are notified of those procedures.

These modifications would help to clarify the full scope of worker protections that are available to program participants.

B. Specific Agency Activities and Recommendations for Future Action[56]

Even with the PRWORA's shift of significant authority from the federal to the state level, there is still an important federal role in welfare programs. Several federal agencies continue to have specific responsibilities to administer, regulate, and/or oversee certain aspects of the TANF and WtW programs. In addition, most federal agencies also have ongoing obligations, independent of the welfare law, to enforce a range of civil rights laws. These civil rights laws, as discussed earlier in this chapter, may apply to a wide range of programs, including welfare programs; thus, federal agencies may be required to ensure compliance with anti-discrimination laws in a variety of different contexts.

The remainder of this chapter describes some of the steps that federal agencies already have taken to address emerging civil rights issues in the context of changing welfare programs, and puts forth recommendations for future agency efforts. In particular, the recommendations track and expand upon five key themes:

- *Getting Accurate Information to the Ground Level and Strengthening Federal-Local Communication.* Many caseworkers are both overwhelmed and confused by the many changes to welfare programs. Getting accurate information to individuals at the ground level is critical to making sure that they are aware of their obligations under the law. And information developed at the national level also must flow down to regional offices to inform them about key policies and foster interagency communication at the regional and local levels, where appropriate.

- *Enforcement and Monitoring.* Vigorous enforcement of civil rights laws and monitoring of state practices are essential to prevent civil rights violations and ensure that complaints and problems are quickly identified, investigated, and remedied.

- *Training.* Training staff at the federal, state, and local levels will help to familiarize them with their legal obligations and ensure that they provide accurate information to clients.

- *Data Collection and Analysis.* Collection and analysis of data, broken down by race and gender, are critical to getting an accurate picture of the real impact of welfare law changes. Investigation of changing caseload demographics, examinination of how different rules affect different populations, analysis of good-cause exemption and sanction rates for arbitrary or uneven application, and evaluation of who does and does not get benefits are only a few examples of important areas for further study.

- *Specific Initiatives to Address Employment Barriers.* Developing programs to address specific barriers that limit participants' employment opportunities is an important strategy for enabling participants to move into the workforce permanently.

These five themes help to frame the different types of activities that federal agencies can and should pursue to fulfill their obligations to enforce civil rights laws effectively.

1. Department of Health and Human Services

HHS, as the agency with the primary responsibility for overseeing the TANF block grant program, plays a critical role in the implementation of the PRWORA. HHS often is the federal agency that works most closely with state welfare agencies and provides technical assistance on key issues. As a result, it frequently may be in the best position to know what issues are emerging at the state level and how states are actually implementing their welfare programs.

Beyond the specific regulatory and administrative responsibilities required under the PRWORA, HHS also has civil rights enforcement responsibilities that extend to many welfare programs. HHS's Office of Civil Rights (HHS-OCR) enforces several federal anti-discrimination laws that cover health care and human services providers who receive funds from HHS, including Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.[57]

Because of its central role in recent welfare changes and implementation efforts, HHS is uniquely positioned to move forward on a number of levels to address civil rights issues that emerge in welfare programs.

a. Getting Accurate Information to the Ground Level and Strengthening Federal-Local Communication

- **Guidance on civil rights laws and how they apply to welfare programs.** The agency has released a Guidance Memorandum on Title VI explaining how Title VI's prohibition against national origin discrimination affects individuals with limited English proficiency.[58] The guidance is an important step toward ensuring that HHS-funded programs understand their legal obligations to individuals who speak little or no English. Moreover, if distributed and publicized effectively, the guidance can be used to raise awareness about ongoing discrimination facing many language and ethnic minorities, and to stress states' obligations to communicate effectively with clients (for example, through developing materials in other languages, hiring bilingual staff, and/or using interpreters). Standing alone, however, the guidance may have limited impact without effective follow-up to ensure that it is widely disseminated, well understood, and consistently enforced. *HHS should follow up with advocates and local agencies to discuss specific problems confronting language minorities, assess how the guidance can be used to highlight and remedy problems, and explore the types of additional information that may be needed to effectively address language barriers.*

Unfortunately, as of December 1998, HHS had yet to release a long-awaited comprehensive guide on civil rights laws and how they apply to welfare participants. Such a guide could serve as a useful reference for caseworkers and clients alike by providing real-world examples of potential discrimination problems and explaining where to go for help. To be most effective, however, the guide must be short, easily understood, and widely disseminated at the ground level. *HHS should finalize guidance on civil rights laws and how they apply to welfare recipients, and widely disseminate it to caseworkers and other agency person-*

nel, service providers, advocates, and welfare recipients.

- **Dissemination of user-friendly materials on civil rights protections.** *HHS should develop straightforward, short, and easy-to-read "know your rights" fact sheets targeted at welfare participants.* These one-page fact sheets on different types of discrimination, such as a fact sheet on pregnancy discrimination or discrimination against disabled individuals, would teach participants about their rights and alert them to what is and is not lawful.

b. Enforcement and Monitoring

- **Vigorous enforcement of Title VI and other antidiscrimination laws.** While states do have wide discretion under the PRWORA, that discretion does not free them from their preexisting and ongoing responsibility to adhere to civil rights laws—nor does it relieve HHS of its civil rights enforcement obligations. As discussed earlier in this chapter, recent data on the demographic changes to welfare caseloads raise questions about possible uneven effects of new welfare rules, particularly as applied to language minorities. Coupled with the long-standing concerns about underenforcement of Title VI, there is a pressing need to invigorate Title VI enforcement efforts to ensure fair treatment in welfare programs and learn more about what is happening at the state and local level. *HHS must take a strong, proactive role in vigorously monitoring state practices, investigating complaints, and investing resources in effective Title VI enforcement.*

- **Ensure that states set up displacement grievance procedures.** Under TANF, states are required to set up grievance procedures to handle complaints about worker displacement. TANF prohibits employers from replacing existing workers with welfare recipients whom they may be able to pay less, or for whom they may receive special subsidies or tax credits. There is anecdotal evidence, however, that some states have refused or neglected to set up these grievance procedures.[89] *HHS should track and make clear that TANF requires states to set up grievance procedures, and push states, particularly as new state plans are submitted, to comply with the law.*

c. Training

- **Conduct trainings for caseworkers and other personnel.** It is essential that federal, state, and local agency personnel understand that welfare participants have civil rights protections and that there are a variety of different resources available to explain what the law requires. *HHS should train caseworkers and other state personnel to alert them to potential civil rights violations and familiarize them with key laws.*

d. Data Collection and Analysis

- **Collection and analysis of data.** *HHS should undertake extensive data collection and analysis to assess the demographic changes to welfare caseloads and to assess compliance with the antidiscrimination laws that it administers.* Beyond the specific provisions of the welfare law, HHS has the discretion to collect whatever information it needs to ensure compliance with civil rights laws[90] and, accordingly, should take steps to gather such data, particularly as many welfare programs are undergoing significant changes. Most importantly, such data should be broken down by race and gender at the local level to get a clearer picture of what is really happening to clients.

e. Specific Initiatives to Address Employment Barriers

- **Examine unique problems facing ethnic minority communities.** *HHS should undertake specific efforts to investigate discrimination facing ethnic minorities.* The agency should work with advocates at the local level to craft and fund specific programs, such as English as a Second Language (ESL) programs, to address specific employment barriers.

2. Department of Labor

The Department of Labor plays a critical role in monitoring a variety of workplace practices. DOL has made important strides, particularly by being the first agency to release guidance on workplace laws and how they apply to welfare recipients.[61] Since the passage of the PRWORA, DOL also has assumed responsibility for administering the WtW grant program authorized under the BBA.[62] In that capacity, DOL's Civil Rights Center is charged with the responsibility for handling complaints of workplace protections violations. DOL also has responsibility for administering several labor-related civil rights laws, including the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA).

There are a number of steps that DOL can take to address employment barriers facing welfare participants.

a. Getting Accurate Information to the Ground Level and Strengthening Federal-Local Communication

- **Disseminating information on WtW employment options and WtW worker protections, and promoting long-term employment and economic security as a central goal.** *DOL should continue to develop and disseminate materials about the WtW law and its worker protections.* DOL's WtW website has been quite useful in offering information about a variety of welfare-related issues; it is also important to disseminate these and other materials to caseworkers, program providers, participants, and others who may not have Internet access.

b. Enforcement and Monitoring

- **Monitor state practices to ensure compliance with the Fair Labor Standards Act and other labor laws.** DOL has made clear its position that the FLSA and other labor laws apply to welfare recipients who go to work (and otherwise satisfy the relevant legal standards). Moreover, DOL has been responsive when some states have sought either to exclude certain welfare participants from FLSA coverage or count a range of other benefits (such as child care assistance) when calculating whether they are meeting the minimum wage requirement.[63] *DOL should be vigilant in monitoring state practices to ensure that states and localities adhere to minimum wage, overtime, FMLA, and other labor protections.*

- **Issue final WtW regulations clarifying the scope of worker protections.** As discussed above, the interim final regulations should be clarified to make clear the full protections available to participants in WtW programs.

- **Explore Office of Federal Contract Compliance Programs (OFCCP) initiatives.** DOL's OFCCP enforces Executive Order 11246, section 503 of the Rehabilitation Act, and the Vietnam-Era Veterans' Readjustment Assistance Act,[64] and oversees contractors who do business with the government. In that capacity, OFCCP has worked with employers, and with local programs that train women, for example, for jobs in nontraditional industries like construction. Through these efforts, OFCCP already has experience in helping to link program participants, some of whom are or have been welfare recipients, with employers and job opportunities. OFCCP also is responsible for monitoring federal contractors to ensure that they do not discriminate and that they take steps to correct problems when they occur. Given this experience, OFCCP may be uniquely positioned to work in a positive way with employers and program participants to open up quality job opportunities. *OFCCP should explore creative strategies for working with employers, welfare-related programs, and program participants to eliminate employment barriers and expand employment opportunities.*

c. Training

- **Conduct trainings for program providers, caseworkers, and other personnel.** *DOL should train program providers, caseworkers, and other personnel to familiarize them with the WtW worker protections and other key laws.* These training sessions could be coordinated with other agencies to avoid duplication and minimize costs.

d. Data Collection and Analysis

- **Collection and analysis of data.** *DOL should collect and analyze data to assess compliance with the anti-discrimination laws that it administers and to evaluate program effectiveness and outcomes for different populations.* It is critical to evaluate the effectiveness of WtW and education/training programs to assess how well participants are being served. DOL should collect data, broken down by race and gender, on post-program outcomes (such as earnings data at 6, 12, 18, and 24 months, and data on the types of jobs participants get) to determine which programs are most successful in helping participants move into jobs that offer decent wages and long-term economic security.

e. Specific Initiatives to Address Employment Barriers

- **Work to expand access to quality education and training programs that can help participants obtain higher wage jobs.** *DOL should take on the responsibility to push for greater access to education and training opportunities that can help participants build necessary skills for higher wage jobs.*

- **Focus on long-term economic security for women.** *DOL should stress the importance of long-term economic security for women.* Many welfare participants cycle in and out of jobs with little or no opportunity for advancement, often for wages that will not support a family. DOL should devise strategies to assist welfare participants with building skills that can lead to higher wage jobs and promote programs whose ultimate goal is to enable participants to find jobs with livable wages.

- **Explore strategies for securing family leave protections for participants.** Many WtW participants may face particularly difficult challenges in trying to balance work and family responsibilities. It is unclear whether some participants will be able to take advantage of federal FMLA protections because they may not satisfy certain eligibility requirements. Nonetheless, these protections are critical for WtW and welfare participants who must keep their jobs or risk having their benefits reduced or terminated. *At a minimum, DOL (and HHS) should urge states to make clear that participants who need to leave work to deal with a family emergency have demonstrated "good cause" to leave work and will not be penalized. Further, DOL should explore creative strategies for securing family/medical leave-type protections for participants.*

3. Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission enforces key employment anti-discrimination laws such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), Title I of the Americans with Disabilities Act (ADA), section 501 of the Rehabilitation Act, and the Equal Pay Act (EPA).[65] In that capacity, the EEOC plays an important role in investigating and resolving a wide range of employment discrimination claims. As already discussed, many workfare participants and other welfare recipients who go to work will confront employment discrimination problems. In December 1997, the EEOC released an important policy guidance examining a variety of contingent work relationships, including an analysis of workfare and welfare-related work arrangements.[66] The EEOC guidance is particularly useful because it makes clear that employment discrimination laws can apply to workfare or other welfare-related employment relationships and explains that there are specific factors considered under each law to determine whether a particular situation is covered. There are several steps that the EEOC can take to examine employment discrimination problems facing welfare recipients.

a. Enforcement and Monitoring

- **Investigation of welfare-related employment discrimination claims.** *The EEOC should continue to work at the national and regional levels to identify, investigate, and challenge employment discrimination problems facing welfare recipients who go to work.* In particular, the EEOC should build relationships at the local level with other agencies and advocates to focus on strategies to uncover and eliminate discriminatory practices.

- **Examine the use of pre-employment inquiries.** *The EEOC should examine whether pre-employment inquiries are used to deny certain welfare recipients employment opportunities.* There are a variety of situations where information could be used improperly at the application stage to exclude certain individuals from being considered for a particular job. For example, is information about an individual's physical abilities used to screen out people with disabilities; or are some individuals denied jobs, regardless of what the job is, because they have a criminal record or past history of substance abuse? There is extensive case law on what questions employers can and cannot ask and how that information can be used. The EEOC should ensure that accurate information about what the law requires is widely disseminated, and work with caseworkers, employers, and program providers to make sure that they understand their legal obligations.

b. Specific Initiatives to Address Employment Barriers

- **Examine unique employment discrimination problems facing ethnic minority communities.** Many ethnic minorities face unique barriers—such as biased stereotypes or employers who unfairly require special work documents or refuse to hire individuals with accents—that limit their employment options. *The EEOC should explore specific initiatives to investigate discrimination facing ethnic minorities and devise strategies for targeting specific industries where problems have been most persistent.*

4. Department of Justice

The Department of Justice (DOJ) enforces several important anti-discrimination laws, including Title VI, and has responsibility for coordinating civil rights enforcement with other federal agencies. As noted earlier, there are already concerns about the impact of new welfare rules on ethnic minority communities, and DOJ can play an important role in investigating and remedying allegations of national origin discrimination. Further, DOJ also can explore new creative strategies to challenge discriminatory practices in employment and other welfare-related settings. In the area of enforcement and monitoring, DOJ should:

- **Strengthen Title VI enforcement efforts and challenge discrimination in welfare-related programs.** *DOJ should explore ways to strengthen Title VI enforcement efforts and focus on developing new strategies to challenge discriminatory practices in employment and other welfare programs.*

V. Conclusion

As states continue to implement new welfare rules, the Clinton Administration must take steps to ensure that individuals and families are treated fairly and help families achieve financial independence. Moreover, the Administration must be a leader in preserving the civil rights of all individuals, particularly those struggling to escape poverty, and removing barriers to employment and economic opportunity.

Endnotes

[1] The authors are staff attorneys at the National Partnership for Women & Families ("National Partnership") in Washington, D.C., a national advocacy group that promotes fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Jocelyn C. Frye is Director of Legal and Public Policy at the National Partnership and Su Sie Ju is a NAPIL Equal Justice Fellow (jointly funded by the National Association of Public Interest Law and the Texaco Foundation) at the National Partnership.

[2] Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Public Law No. 104-193, 110 Stat. 2110 (1996) (codified at 42 U.S.C.A. § 601-1788).

[3] See Jocelyn Frye, Joan Entmacher, and Susannah Baruch, *Building Bridges—or Barriers? Ending Welfare As We Know It, in* Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration* (1997).

[4] The U.S. Department of Health and Human Services (HHS) reported that the overall number of welfare recipients declined by 32% between August 1996 and June 1998, representing a decline of approximately 3,861,000 individuals receiving welfare assistance. During that same time period, the overall number of families receiving welfare benefits declined by 31%, a decline in actual numbers of 1,384,000 families. HHS Administration for Children and Families, *Change in Welfare Caseloads Since Enactment of the New Welfare Law* (Aug. 1998).

[5] As discussed later in this chapter, there is limited definitive data on what is happening to welfare recipients as they exit the welfare system. Several states have undertaken limited studies to track what happens to participants who leave welfare programs, but the data collected varies from state to state. See Arloc Sherman, *et al., Welfare to What: Early Findings on Family Hardship and Well-Being*, at 47 (Children's Defense Fund and National Coalition for the Homeless Nov. 1998) (noting that major limitations of current state research include the lack of comparability and lack of representativeness). See also American Public Human Services Association, *et al., State Efforts to Track and Follow Up on Welfare Recipients, <http://www.aphsa.org/reform/track.htm>*.

[6] Before enactment of the PRWORA, HHS had authority to waive certain statutory requirements for states' Aid to Families with Dependant Children (AFDC) programs. U.S. General Accounting Office (GAO), *Welfare Reform: States Are Restructuring Programs to Reduce Welfare Dependence,* at 15 (June 1998). Between January 1987 and August 1996, 46 states received waivers; some waiver initiatives were approved for implementation statewide, while others were limited to selected sites. *Id.* See also Mark Greenberg, *Waivers and Block Grant Implementation: Initial Questions* (Center for Law and Social Policy Aug. 12, 1996) (discussing the relationship between the Temporary Assistance for Needy Families (TANF) block grant requirements, current state welfare waivers, and pending state waiver requests).

[7] The PRWORA requires states to have a specific percentage of their caseload participating in designated work activities each year. In FY1998, states are required to have at least 30% of all families in their caseload participating in specified work activities and at least 75% of two-parent families participating in work activities. These requirements get progressively higher over time—in FY1999, states must have 35% of all families and 90% of two-parent families working; in FY2000, states must have 40% of all families and 90% of two-parent families working; in FY2001, states must have 45% of all families and 90% of two-parent families working; and in FY2002, states must have 50% of all families and 90% of two-parent families working. PRWORA § 407(a)(1)-(2).

[8] While most "work first" programs share the same basic premise (i.e., "any job is a good job"), programs have been designed in a variety of ways. See generally Amy Brown, *Work First: How to Implement an Employment-Focused Approach to Welfare Reform* (Manpower Demonstration Research Corp. Mar. 1997). The most suc-

cessful programs have used a mix of strategies, such as job search and short-term education and training with an emphasis on employment, to move participants into the workforce. *Id.* at 4. Even the successful programs, however, have not been able to move significant numbers of participants out of poverty. *Id.* And, overall, the results of "work first" programs have been mixed. Critics of the "work first" approach argue that pushing participants quickly into any job ignores the long-term benefits of investing in education and training programs to build participants' skills for higher wage jobs. The "work first" approach, they argue, too often leaves participants mired in low-wage jobs, bouncing from job to job and ultimately unable to support themselves and their families. Because of these inadequacies, some communities and programs have focused instead on building participants' skills to foster long-term employment and better wages. See Ann Scott Tyson, "From Welfare Rolls to Machine Shop," *Christian Science Monitor*, Mar. 11, 1998, at 1; Alan Finder, "Training Programs Provide an Alternative to Workfare Jobs," *The New York Times*, June 16, 1998, at A1. Nonetheless, the "work first" approach prevailed during the PRWORA debate, and many state programs now use that model to move clients quickly into jobs.

[9] Several states have added diversion components to their welfare programs to divert potential clients from the welfare caseload when they apply for welfare benefits. For example, in Logan County, Colorado, 90% of eligible applicants have been diverted from welfare in exchange for one-time cash payments with the understanding that they cannot submit another application for a certain period of time. Barbara Vobejda and Judith Havemann, "States' Welfare Shift: Stop It Before It Starts," *The Washington Post*, Aug. 12, 1998, at A1. Concerns have been raised, however, that these diversion efforts create incentives for caseworkers to discourage applicants, even in cases where benefits are sorely needed. In New York City, for example, local and federal investigators are looking into allegations that applicants for food stamps were forced to wait several days or discouraged from getting food stamps at all. Rachel Swarns, "U.S. Inquiry Asks if City Deprive Poor," *The New York Times*, Nov. 8, 1998, § 1 at 39.

[10] Testimony of Roberta Spalter-Roth, before the Subcommittee on Human Resources, Committee on Ways and Means, U.S. House of Representatives, on *Welfare That Works: Increasing AFDC Mothers' Employment and Income* (Feb. 2, 1995); Judith M. Gueron, "Work Programs and Welfare Reform Research into JOBS Suggests That Work is Central to Reform," *reprinted in Public Welfare*, at 15 (Summer 1995). See generally LaDonna Pavetti, *Learning From the Voices of Mothers: Single Mothers' Perceptions of the Trade-offs Between Welfare and Work* (Manpower Demonstration Research Corp. 1993) (interviews with Massachusetts welfare recipients revealing that many women move back and forth between work and welfare, often returning to welfare because of financial pressures, job loss, inadequate child care, or health problems).

[11] See, e.g., Harry J. Holzer, *Employer Demand, AFDC Recipients, and Labor Market Policy* (Institute for Research on Poverty Nov. 1996) (Discussion Paper No. 1115-96) (survey of employers in four major cities—Atlanta, Boston, Detroit, and Los Angeles—found that firms were less likely to hire African Americans, with firms in the suburbs and smaller firms especially likely to discriminate against African Americans); Katherine S. Newman, "Dead-end Jobs: A Way Out Improving Job Mobility in the Inner City," *Brookings Review*, at 25 (Fall 1995) (describing Harlem fast food study concluding that racial stereotypes and stereotypes about the "underclass" limited job opportunities and job mobility for many low-income African American job seekers).

[12] See, e.g., Ariel Kalil, *et al.*, *Getting Jobs, Keeping Jobs, and Earning a Living Wage: Can Welfare Reform Work?*, at 9 (Institute for Research on Poverty Aug. 1998) (Discussion Paper No. 1170-98) (discussing connection between welfare receipt and depression, and reporting on studies that found the percentage of welfare recipients who meet the criteria for clinical depression is nearly double the percentage of those who do not receive assistance).

[13] Several studies have found that a substantial number of welfare recipients are victims of domestic violence. A report for the Project for Research on Welfare, Work, and Domestic Violence reviewed four recent studies of welfare recipients in New Jersey, Massachusetts, and Chicago and found high percentages of women who were current or past victims of domestic abuse. Jody Raphael and Richard M. Tolman, *Trapped in Poverty/*

Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare (The Project for Research on Welfare, Work, and Domestic Violence Apr. 1997). The Massachusetts study, for example, examined a scientific sample of the state's entire AFDC (the PRWORA's predecessor) caseload and found that 19.5% of the sample were current victims of domestic violence and another 64% were past victims of domestic violence. The study also discussed the negative impact that domestic violence can have on victims' job opportunities—15.5% of domestic violence victims report that their current mates would not like them to go to school or work, as compared to only 1.6% of women who had not experienced domestic abuse. Mary Ann Allard, *et al.*, *In Harm's Way? Domestic Violence, AFDC Receipt and Welfare Reform in Massachusetts* (University of Massachusetts, Boston: McCormack Institute & the Center for Survey Research Apr. 1997). See generally GAO, *Domestic Violence Prevalence and Implications for Employment Among Welfare Recipients* (Nov. 1998).

[14] The PRWORA caps at 30% the percentage of participants who can be counted toward a state's work participation rate by participating in vocational education training. Section 407(d). Several studies, however, have documented the financial benefits of additional education. For example, women who obtain a bachelor's degree earn 28–33% more than their peers. Julie Strawn, *Senate Amendment to Welfare Law Allows States to Train Hardest-to-Employ Adults, Help Others Find Better Jobs* (Center for Law and Social Policy Aug. 1998) (Fact Sheet). And studies tracking welfare recipients who received two- or four-year degrees found that approximately 90% left welfare and earned far more than other welfare participants. *Id.* at 4.

[15] A review of the data on declining welfare caseloads revealed that a significant percentage of closed cases were due to sanctions, and in some cases that percentage actually exceeded the percentage of clients leaving for employment. Barbara Vobejda and Judith Havemann, "Sanctions: A Force Behind Falling Welfare Rolls," *The Washington Post*, Mar. 23, 1998, at A1. Many of these sanctions later turned out to be erroneous, but clients already had been cut off and unfairly denied benefits. See, e.g., Joel Ferber and Rachel Storch, *Full-Family Sanctions: Not Worth the Risk* (Apr. 17, 1998) (reporting on the example of a client who received an erroneous notice to appear at the local welfare office on a state holiday, reported to the office but discovered it was closed, and was later cut off from welfare, food stamps, and Medicaid for two months). And many sanctions involved clients who may not have complied with a specific rule because of problems dealing with a particular employment barrier such as mental health problems or lack of transportation. For example, a Minnesota study found that sanctioned families were twice as likely to report mental health problems as other welfare recipients and four times more likely to report problems with substance abuse. *Id.* at 8. See also, Russ Overby and Hugh Mundy, *Who's Off First? A Look at the Impact of "Families First" and the Effects of Welfare Reform in Tennessee* (Tennessee Justice Center) (finding that families sanctioned under Tennessee's sanction policies included individuals who missed work for lack of child care or transportation vouchers).

[16] Jason DeParle, "Welfare Rolls Show Growing Racial and Urban Imbalance," *The New York Times*, July 27, 1998, at A1 (relying on an analysis of Census Bureau data). As of mid-December 1998, HHS had yet to release its own caseload demographic data. Some cities have been able to match the welfare caseload declines experienced in the rest of their state, but others have not. For example, Detroit, Milwaukee, Miami, St. Louis, Cleveland, Baltimore, and Philadelphia all report slower caseload declines than the rest of their states, while Atlanta, Boston, Los Angeles, and Bridgeport, CT have all kept pace with their states' overall rates. *Id.* at A12.

[17] *Id.* at A1.

[18] Rachel L. Swarns, "Hispanic Mothers Lagging as Others Escape Welfare," *The New York Times*, Sep. 15, 1998, at A1.

[19] The Urban Institute, *Profile of Disability Among AFDC Families*, at 11 (Summer-Fall 1996). According to a recent report by the Urban Institute, estimates of all welfare recipients with work-related disabilities, mental health problems, and substance abuse range from less than 10% to almost 30%, and estimates of recipients with learning disabilities range from 25% to 40%. Terri Thompson, *et al.*, *State Welfare-to-Work Policies for People with*

Disabilities, at 1 (The Urban Institute Dec. 1998) (citing Amy Johnson and Alicia Meckstroth, *Ancillary Services to Support Welfare to Work* (HHS, Office of the Assistant Secretary for Planning and Evaluation June 1998), which offers a review of study estimates for different types of disabilities).

[20] For a more extensive discussion of these issues, see Michael Fix and Wendy Zimmermann, "The Legacies of Welfare Reform's Immigrant Restrictions," chapter XI in this report.

[21] For an overview of key civil rights laws, see National Partnership for Women & Families, *Preventing Discrimination: A Fact Sheet for Caseworkers and Others Helping Welfare Recipients Enter the Workforce* (Dec. 1998).

[22] Both the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) have issued guidance making clear that workplace laws apply to welfare recipients who go to work (assuming they otherwise satisfy a particular law's legal definitions of who is covered). See Department of Labor, *How Workplace Laws Apply to Welfare Recipients* (May 1997) (hereinafter "*DOL Guidance*"); Equal Employment Opportunity Commission, *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (Dec. 1997) (hereinafter "*EEOC Guidance*").

[23] The PRWORA's failure to refer specifically to several civil rights laws was a source of controversy during negotiations on the Balanced Budget Act of 1997 (BBA), Public Law No. 105-33, almost one year after the passage of the PRWORA. Some Republican lawmakers, in response to the Clinton Administration's position that employment laws cover welfare recipients, see *supra* note 22, sought to include specific language in the BBA stating that workfare participants could not be considered employees for purposes of any federal law, including key employment laws such as the Fair Labor Standards Act. See Robert Pear, "House Republicans Move to Bar Minimum Wage for Workfare," *The New York Times*, June 12, 1997. These lawmakers and their supporters argued that extending coverage of workplace laws to welfare recipients would overburden employers and states and make programs too expensive to operate. More fundamentally, they argued that welfare recipients participating in workfare and similar programs were not "regular workers" and not performing real work. See, e.g., 143 *Congressional Record* H5038 (daily ed. July 10, 1997) (statement of Representative Linder) ("We are talking as though hard working American citizens are being denied basic rights of employment. These are welfare recipients . . . . It is dishonest . . . to try and convince America that these are hardworking people just trying to raise their families when in fact they are welfare recipients, getting $8.50 to $9 an hour in benefits from the taxpayers already . . . .). Fortunately, these efforts to exclude welfare recipients from coverage of key workplace laws were effectively rejected in the final version of the BBA.

[24] This chapter does not address the religious discrimination/charitable choice provisions included in the welfare law.

[25] The Age Discrimination Act of 1975 prohibits age discrimination in federally funded programs. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on handicap (disability) in federally funded programs. The Americans with Disabilities Act of 1990 prohibits discrimination against people with disabilities and requires employers to make reasonable accommodations for disabled workers. And Title VI of the Civil Rights Act prohibits discrimination based on race or national origin in federally funded programs.

[26] See *supra* note 23.

[27] H.R. 2400, 105th Congress § 3037 (1998). Of that $750 million, $500 million is guaranteed and an additional $250 million can be appropriated. Section 3037. See generally 63 Federal Register 60,168 (Nov. 6, 1998); *Surface Transportation Policy Project Fact Sheet on Access to Jobs Program* (June 11, 1998).

[28] An "access to jobs project" is defined as a project "relating to the development of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment." TEA-21 § 3037(b)(2)(B). A "reverse commute project" is defined as a project "related to the development of transportation services designed to transport residents of urban areas, urbanized areas,

and areas other than urbanized areas to suburban employment opportunities . . . ." TEA-21 § 3037(b)(2)(C).

[29] Currently, under the PRWORA, in addition to the 30% cap, see *supra* note 14, participants cannot participate in vocational education training for more than 12 months.

[30] See § 861 of the Higher Education Amendments of 1998, Public Law No. 105-244, 112 Stat. 1581.

[31] See generally U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (June 1996).

[32] At the time that this chapter was finalized in December 1998, the survey results were still under analysis. The conclusions about the survey discussed herein reflect our preliminary assessment based on a review of approximately 220 survey responses received thus far from 45 states. The National Partnership (with assistance from Women Work! The National Network for Women's Employment, AFL-CIO, Equal Rights Advocates, Women Employed, and Wider Opportunities for Women) has distributed surveys to approximately 1,700 program providers across the country.

[33] In this paragraph, the term "state TANF plans" refers to the first plans submitted by states, after the enactment of the PRWORA, to obtain TANF funds. The PRWORA required states to submit these plans as a condition for receiving TANF funds.

[34] See, e.g., Wisconsin's state plan, dated August 1996.

[35] See, e.g., California's state plan, dated October 1996, at 14-15.

[36] See BBA § 5501 (amending § 402(a) of the Social Security Act so that "the term 'eligible State' means, with respect to a fiscal year, a State that, during the 27-month period ending with the close of the first quarter of the year, has submitted to the Secretary a plan that the Secretary has found to include . . ." all the elements listed in § 402). According to HHS, Massachusetts, Michigan, Vermont, and Wisconsin will need to renew their eligibility status by submitting a state plan by no later than December 31, 1998. HHS, Administration for Children and Families, Office of Family Assistance, *Temporary Assistance for Needy Families Program Policy Announcement* (Transmittal No. TANF-ACF-PA-98-3) (May 15, 1998).

[37] See, e.g., state nondiscrimination provisions: Cal. Wel. & Inst. Code § 11322.62 (West 1998); Fla. Stat. Ann. §§ 414.065(11)(a), 414.45 (West 1998); Md. Regs. Code tit. 7, § 3.03.17 (1998); N.Y. Soc. Serv. Law § 331 (McKinney 1998); health and safety provisions: Cal. Wel. & Inst. Code § 11324.6 (West 1998); Ariz. Rev. Stat. § 46-299(I)(3)(a) (1998); Fla. Stat. Ann. § 414.065(11)(a) (West 1998); nondisplacement provisions: Md. Regs. Code tit. 7, § 3.03.17-1 (1998); 305 Ill. Comp. Stat. 5/9A-13 (West 1998); Me. Rev. Stat. Ann. tit. 26 § 1403 (West 1998); provisions concerning grievance procedures: Cal. Wel. & Inst. Code § 11324.7 (West 1998); Ill. Admin. Code tit. 89, § 112.78(s)(3) (1998); Wis. Admin. Code. § DWD 12.14(2)(f), (3)(d) (1998); and wage compensation provisions: Ariz. Rev. Stat. § 46-299(I)(2)(b) (1998); N.Y. Comp. Codes R. & Regs. tit. 12, §§ 1300.9(a) (4), (7) (1998); Wis. Stat. Ann. § 49.148 (West 1998).

[38] California Department of Social Services, *Regulations to Implement the California Work Opportunity and Responsibility to Kids (CalWORKs) Welfare-to-Work and County Plan Requirements*, at 65 (July 1, 1998) (All County Letter No. 98-4). See also the District of Columbia's emergency rules adopted September 30, 1998, D.C. Mun. Regs. tit. 29, § 5811.10(f) ("Good cause shall include circumstances beyond the individual's control such as, but not limited to, the following: . . . Discrimination by an employer in violation of District or Federal law.").

[39] See, e.g., New York Comp. Codes R. & Regs. tit. 12, § 1300.9(a) (4), (7) (1998).

[40] See California Department of Social Services, *Application of the Fair Labor Standards Act to Welfare-to-Work Activities Under the California Work Opportunity and Responsibility to Kids (CalWORKs) Program* (May 7, 1998) (All County Letter No. 98-32) (instructing county welfare agencies that the FSLA does not cover many welfare-to-work activities, including work experience, adult basic education, job skills training, vocational education and training, and job search and job readiness assistance). See also letter from John R. Fraser, Acting

Administrator, Wage and Hour Division, DOL, to Chairwoman Dion Louise Aroner, Assembly Committee on Human Services (Mar. 30, 1998) (on file with authors).

[41] See, e.g., letter from Gerald W. McEntee, International President, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), to Alexis Herman, Secretary, DOL, and to Donna Shalala, Secretary, HHS (Apr. 15, 1998) (on file with authors). District Council 37 of AFSCME filed a lawsuit against the New York City Mayor, challenging the planned layoff of incumbent hospital workers as an illegal act of displacement. In the face of the lawsuit, the Mayor withdrew workfare participants from their hospital assignments. See, e.g., Austin Fenner, "Hospital Jobs on the Line in Suit Hearing Today," *New York Daily News*, Apr. 27, 1998.

[42] See, e.g., *Capers v. Giuliani*, 677 N.Y.S.2d 353 (1998) (failure to comply with health and safety protections by denying workfare workers assigned to street cleaning and debris removal access to toilets, water for drinking and washing, protective equipment, and appropriate training and supervision); *Santana v. Hammons*, 673 N.Y.S.2d 882 (1998) (caption amended to reflect Mitchell *et al.* as named plaintiffs) (inappropriate workfare assignments for persons with physical and/or mental disabilities); *Ramos v. McIntire*, Civil Action No. 98-2154E (Mass. Super. Ct., Suffolk Cty. Aug. 25, 1998) (failure to provide meaningful access to educational employment preparation programs for TANF recipients with learning disabilities); Docket No. 1096000272 (HHS, Office of Civil Rights, Region X Mar. 12, 1997) (discrimination by welfare caseworker against clients of Mexican origin by seeking to deny benefits and by making demeaning and derogatory comments).

[43] For example, through a survey of former welfare recipients, the Wyoming Department of Family Services (DFS) learned that many of the surveyed families had a head of household who either was disabled or had to care for someone else in the household who was, and that they left the program because they could not comply with the employment and work search requirements. W. Mgmt. Serv., LLC, *A Survey of Former POWER Recipients*, at 13 (May 1998). The report summarizing the survey findings recommended that DFS reexamine work search and training requirements for disabled persons and those who care for household members with disabilities. *Id.* at 14.

[44] Several cases reveal the need for a more effective complaint process and the need to educate both caseworkers and welfare recipients about the existence of this process. For example, an investigation by HHS's Office of Civil Rights in Docket No. 1096000272, *supra* note 42, revealed a ten-year history of complaints that a caseworker had harassed people of Mexican origin and that the harassment had not been addressed by the local welfare office due to ineffective policies and procedures. In a sexual harassment complaint currently pending before the EEOC, a female TANF recipient assigned to New York City's workfare program alleges, among other things, that she was never provided with information concerning the City's sexual harassment policies or with information as to how to report incidents of harassment. *Doe v. Commissioner of Human Resources Admin.*, No. 160981302 (EEOC filed Mar. 5, 1998).

[45] Several federal agencies are involved, in some form, in welfare-related programs, but HHS and DOL respectively have significant responsibilities for developing regulations for the TANF and Welfare-to-Work (WtW) programs.

[46] Temporary Assistance for Needy Families Program, 62 Federal Register 62,123 (1997) (to be codified at 45 C.F.R. § 270) (proposed Nov. 20, 1997).

[47] Welfare-to-Work Grants, 62 Federal Register 61,587 (1997) (codified at 20 C.F.R. § 645).

[48] Temporary Assistance for Needy Families Program, 62 Federal Register 62,123, 62,127 (1997).

[49] 20 C.F.R. § 645.255(a) (1998).

[50] The statutory language on the nondisplacement, health and safety, and nondiscrimination worker protections specifically limits their application to WtW *work* activities. See PRWORA § 403(a)(5)(J)(I) (prohibiting nondisplacement in work activities), § 403(a)(5)(J)(ii) (extending health and safety protections to "working conditions of [WtW] participants engaged in a work activity"), and § 403(a)(5)(J)(iii) (prohibiting gender discrimination "with respect to participation in work activities").

[51] The WtW regulations use different definitions of work activities to limit the coverage of certain worker protections to a select group of WtW-funded activities. Specifically, in the sections about health and safety protections, 20 C.F.R. § 645.260(a), and protection from nondisplacement, 20 C.F.R. § 645.265, the regulations refer only to allowable WtW *employment* activities (as defined in 20 C.F.R. § 645.220(b)), which excludes other allowable WtW activities that are related to employment, such as job readiness activities, job placement services, post-employment services, and job retention services, 20 C.F.R. §§ 645.220(a), (c)-(e). The regulation on protection from nondiscrimination, 20 C.F.R. § 645.255(d), uses a slightly broader interpretation of work activities by covering WtW participants in job readiness, in addition to employment activities. But the nondiscrimination provision of 20 C.F.R. § 645.255(d) also excludes from coverage other WtW allowable activities such as job placement, post-employment, and job retention services.

[52] Occupational skills training is an allowable WtW post-employment activity. 20 C.F.R. § 645.220(d)(2).

[53] PRWORA § 407(d).

[54] Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, sex, religion, and national origin. Title IX of the Education Amendments of 1972 prohibits discrimination in federally funded education programs or activities.

[55] For example, case law developed under both Title VII and Title IX makes clear that the prohibition against sex discrimination covers a wide range of conduct, including sexual harassment and pregnancy discrimination. See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (interpreting Title VII, and finding that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate(s)' on the basis of sex"); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (interpreting Title IX, and noting: "we believe the same rule (as applied in *Vinson*) should apply when a teacher sexually harasses and abuses a student").

[56] Although there are a number of federal agencies that may be involved in welfare-related activities, this chapter will limit its recommendations to agencies with extensive civil rights enforcement responsibilities.

[57] See *supra* note 25.

[58] HHS, Office of Civil Rights, *Guidance Memorandum Title VI Prohibition Against National Origin Discrimination—Persons with Limited-English Proficiency* (Jan. 1998).

[59] For example, in a letter to a New York Assemblywoman, New York's Acting Commissioner for the Department of Labor made clear that the State would assume that employees already had access to various existing grievance procedures rather than set up a TANF grievance procedure. Letter from James T. Dillon, Acting Commissioner, State of New York Department of Labor, to the Honorable Catherine Nolan, New York State Assembly (Oct. 16, 1997).

[60] 45 C.F.R. § 80.6(b) (department official has discretion to collect information to determine compliance with the law). See *Madison-Hughes v. Shalala*, 80 F.3d 1121 (6th Cir. 1996). Both the Age Discrimination Act and section 504 track Title VI's data collection requirements. See 45 C.F.R. § 84.61 (incorporating Title VI's procedural provisions by reference); 45 C.F.R. § 91.34 (revised to parallel Title VI, Title IX, and section 504 implementing regulations); see 47 Federal Register 57,863.

[61] See *supra* note 22.

[62] HHS has primary responsibility for WtW participant data collection and, on October 29, 1998, in collaboration with DOL, issued for comment an interim final rule on data collection reporting requirements. Welfare to Work Data Collection, 63 Federal Register 57,919 (1998).

[63] For example, the Department of Labor's Wage and Hour Division responded to a draft All-County Letter from California's Governor, *supra* note 40, and took issue with the draft letter's Fair Labor Standards Act (FLSA) analysis. Letter from John R. Fraser, *supra* note 40. DOL explained the appropriate legal analysis to make clear that the FLSA may apply to a welfare recipient who goes to work if the recipient satisfies the law's definition of employee.

[64] Executive Order 11246, as amended, prohibits race, color, sex, religious, and national origin discrimination by all contractors and subcontractors with a federal contract or "federally-assisted construction contract" worth more than $10,000 annually. Section 503 of the Rehabilitation Act of 1973 prohibits discrimination against persons with disabilities by federal contractors with contracts of more than $10,000 annually. The Vietnam Era Veterans' Readjustment Assistance Act prohibits employment discrimination against Vietnam-era and special disabled veterans by federal contractors with contracts of more than $10,000 annually.

[65] Title VII prohibits discrimination in employment based on race, color, sex, national origin, and religion. The Age Discrimination Employment Act (ADEA) prohibits discrimination in employment against individuals 40 years of age and older. Title I of the Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities. Section 501 of the Rehabilitation Act prohibits discrimination in federal employment based on handicap. And the Equal Pay Act (EPA) prohibits wage discrimination based on sex, where one sex receives unequal wages for work that is equal or substantially equal to work performed by the other sex.

[66] See *EEOC Guidance, supra* note 22.

Chapter XI

The Legacies of Welfare Reform's Immigrant Restrictions

by Michael Fix and Wendy Zimmermann[1]

Overview

The 1996 welfare reform law marked a sharp exclusionary turn in U.S. immigrant policy with new, unprecedented bars imposed on legal immigrants' receipt of public benefits. However, in the two years following passage of the law, SSI and food stamps have been restored to some immigrants, while states and the federal government have generally sought to soften the law's impact.

Despite these developments, the welfare reform law remains a watershed in U.S. immigrant policy. Nearly three-fourths of non-citizens who were receiving food stamps have not had their federal eligibility restored, including working-age non-citizens. The loss of benefits will affect the total resources available to the families of these non-citizens. As one in ten American children lives in a mixed-status family with at least one non-citizen parent and one citizen child, the restrictions' impacts will affect many poor citizen children. Immigrants entering the U.S. after the passage of the law on August 22, 1996, remain barred from receiving federally funded Medicaid and TANF for five years, and food stamps and SSI until citizenship.

Welfare reform also ushered in a number of normative and institutional changes that, when taken together, could limit immigrants' use of public benefits for which they remain eligible. Administrative data from Los Angeles County indicate that between January 1996 and January 1998, monthly approvals of AFDC/TANF and Medicaid cases for legal immigrants fell by 71%. During the same period, the number of monthly approvals for citizen cases did not change. These shifts in immigrant approvals occurred despite the fact that legal immigrants' eligibility for the benefits did not change in California. The results, then, can be read to suggest that welfare reform, along with related policy changes, is having a profound chilling effect on eligible immigrants' use of public services.

I. Long-Term Legacies and Early Reversals

Like many Western industrialized nations, the United States has sought to reduce its welfare expenditures by restricting the benefits extended to immigrants. Few Western countries, though, have reversed their immigrant eligibility policies as sharply as the United States. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) signaled a striking departure from an inclusionary social welfare policy that made legal immigrants eligible for public benefits on largely the same terms as citizens, to one that systematically discriminates against most non-citizens.

Yet welfare reform's immigrant restrictions have been substantially scaled back in the two years following enactment. In August 1997, one year after PRWORA's passage, Congress reversed course and restored Supplemental Security Income (SSI) eligibility for most immigrants who were in the United States when the 1996 law was enacted. At the same time, despite their authority to deny legal immigrants public benefits, states were taking the high road and extending Medicaid and cash welfare benefits to these immigrants. Then in June 1998, Congress voted to restore federal food stamp eligibility to immigrants who were elderly, disabled, or under 18 and were in the U.S. when the law passed.

Despite these reversals, welfare reform's immigrant provisions remain a watershed in social welfare policy because they leave a number of far-reaching, largely overlooked legacies. First, the law still restricts non-citizens' and especially new non-citizens' eligibility for public benefits, representing a now official policy of immigrant exceptionalism. Second, the law signals changing societal norms regarding immigrants' use of public benefits—norms that are influencing the law's implementation and appear to be affecting the willingness of immigrants to apply for benefits for which they remain eligible. Third, the law revolutionizes the governance of immigrant policy by devolving immigrant eligibility decisions to state and local governments; imposing new verification and reporting requirements; and fusing immigrant and social welfare policy, as issues of immigrant eligibility are explicitly layered onto *all* decisions to create or expand social programs.

Taken together, these legacies introduce deep structural changes in membership, social policy, and federalism that will be hard to undo, even if the anti-immigrant attitudes and policies of the 1990s begin to recede.

A. Welfare Reform's Immigrant-Specific Provisions: An Overview

As enacted, welfare reform transformed immigrant policy[2] by:

- Barring most immigrants from food stamps and SSI—cash assistance for the poor elderly and disabled. These include "current" immigrants who were already in the United States at the time the law was enacted, and new or "future" immigrants who had yet to enter;

- Barring new immigrants for five years from "federal means-tested benefits," defined to include Temporary Assistance for Needy Families (TANF) and Medicaid;

- Giving states the option of barring current immigrants (i.e., those in the U.S. on or before August 22, 1996) from TANF, Medicaid, and the Social Services Block Grant. The law also gives states the option of barring new immigrants (arriving after August 22) from TANF and Medicaid following the mandatory five-year bar;

- Exempting some legal immigrants with strong equities from the benefit restrictions. These include refugees during their first several years in the United States, legal immigrants who have worked in the United States for ten years or whose spouse or parents have done so, and non-citizens who have served in the U.S. military; and

- Barring "unqualified immigrants" from all "federal public benefits"[3] and requiring the public agencies that dispense them to verify the legal status of applicants. Unqualified immigrants not only include undocumented immigrants, but other groups with authority to remain in the United States without permanent residence.

B. Early Implementation: Mitigating the Impact

To date, many of the choices made by those implementing welfare reform have sought to soften the law's potentially devastating effects on immigrants. Upon signing welfare reform into law, President Clinton announced that he wanted the immigrant provisions scaled back, and their subsequent history has largely—but not entirely—followed his lead.

The systematic softening of the law's impact can be traced to several converging developments. First, it reflects the forging of strong new interest-group coalitions made up of immigrant advocacy organizations like the National Immigration Law Center, as well as more broad-based policy groups such as the Center on Budget and Policy Priorities. Benefit restorations have also been driven by extensive media coverage of the initial impact of SSI and food stamp cuts on immigrants.[4] The policy reversals have drawn on a delayed congressional recognition of the nation's changed demographics, and on bipartisan concern within high-immigration states that the costs of federal restrictions would be passed through to state taxpayers. And, of course, the restoration of federal benefits has been carried out against the economic backdrop of unexpectedly large federal budget surpluses.

How have the draconian immigrant measures originally enacted been softened? At the *federal* level, Congress and the Administration:

- Restored SSI eligibility to all qualified and unqualified immigrants who were receiving benefits when PRWORA passed and to qualified immigrants who were in the United States as of August 22, 1996, who eventually qualify as disabled;[5]
- Restored food stamp eligibility to elderly and disabled immigrants and to legal immigrants under 18 who were in the U.S. when the law passed;
- Defined "federal means-tested public benefits" quite narrowly, limiting it to TANF, Medicaid, SSI, food stamps and now, apparently, the new state Child Health Insurance Program (CHIP).[6] Early legislative proposals would have extended these bars to anywhere from 60 to 100 federal programs;
- Extended the period of time refugees are eligible for SSI, Medicaid, and food stamps from five to seven years after their arrival;
- Expanded the definition of qualified alien to include certain immigrants and their children who are the victims of domestic violence. Certain Cuban and Haitian immigrants and Amerasians were also made eligible for benefits on the same terms as refugees;
- Exempted private, nonprofit organizations from verifying the immigration status of applicants for services or benefits; and
- Excluded several child-oriented public benefit programs from those defined as "federal public benefits," thereby exempting them from verification requirements. (Two such exempted programs are Head Start and the Maternal and Child Health Care program.)

At the same time, in a striking development in fiscal federalism, many of the *states* made unexpectedly generous implementation decisions. Among other things, they developed their own food stamp replacement programs, usually for elderly or disabled immigrants and for immigrant children. Eighteen states, including all major immigrant-receiving states, have so far enacted such programs.[7] All states chose *not* to bar unqualified immigrants, including undocumented aliens, from the food supplement program for Women, Infants and Children (WIC)[8]—despite their newfound powers to do so. Finally, almost all states retained the eligibility of current immigrants for TANF, Medicaid, and services provided under the Social Service Block Grant.[9] In a few instances, states—most notably California—have even provided state-funded TANF and Medicaid to new or "future" immigrants who are barred from the federally funded programs for five years. They have done so despite the fact that the full costs of these programs are borne by state treasuries.[10]

II. Immigrant Eligibility in The Wake of Reform

These efforts to blunt welfare reform's impacts aside, many immigrants have still lost eligibility for public benefits.

A. Food Stamps

Recent federal food stamp legislation restores eligibility to an estimated 250,000 non-citizens or roughly one quarter of the approximately 935,000 non-citizens who lost federal benefits. The restoration leaves out future immigrants altogether.[11] In fact, this bill's $818 million price tag represents less than one-quarter of the estimated $3 billion, five-year savings from the immigrant food stamps cuts. As the congressional food stamp proposal was modeled on the SSI restorations, it covers only those who were 65 or older when the law passed, those under 18, and the disabled.[12] Since SSI is a program for the elderly and disabled, nearly all current immigrants regained their eligibility for SSI. But by following the SSI population "model," Congress left out the largest group of needy immigrant food stamp recipients: working-age adults.[13]

Further, most states with large immigrant populations were already providing state-funded food replacement programs to children and the elderly. While these states will certainly appreciate the federal government's resuming its payments, few immigrant families in these states will see an increase in their food stamps.

With the restoration of federal food stamps, the state food programs, in their current form, become a less important element of the safety net for legal immigrants. Still, federal food stamps for immigrants did not resume until November 1998, and state programs offered a bridge in the interim. In addition, states could shift the funds they were spending on benefits for the elderly, disabled, and child immigrant populations to working-age non-citizen adults, as California has already done.

The state food replacement programs offer a window onto the post-devolution world of immigrant policy set in motion by welfare reform. A key fact here has been the limited reach of the state replacement programs: only about 200,000 of the 935,000 immigrants who were expected to lose eligibility for federal food stamps by August 1997 had their eligibility restored under the state programs.[14]

Two explanations stand out for the fact that so few immigrants were covered by state-funded food benefits. First, like the federal restorations, many state programs left out working-age adults.[15] Second, most (32) states had no replacement program. While the states without programs were not by and large the major immigrant-receiving states, immigration to non-traditional destinations has been rising rapidly. The number of immigrants settling in the 40 states with the smallest immigrant populations rose by 50% from 3.7 to 5.6 million between 1990 and 1996 alone.[16] Hence, the number of immigrants losing eligibility in these states is far from negligible.

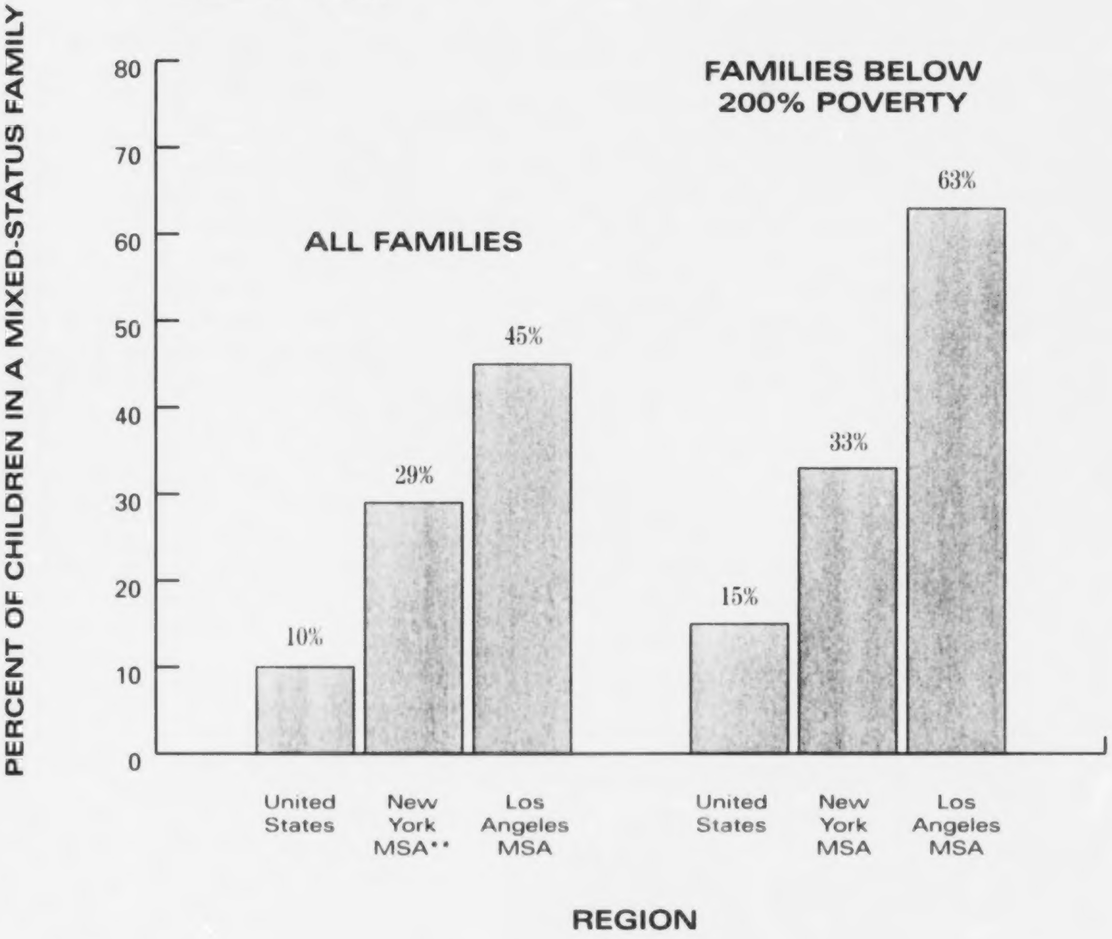
B. Impact on Mixed Families and Citizen Children

One little-noticed population edged out of the safety net by welfare reform's immigrant provisions is the U.S.-born citizen children of legal and undocumented immigrants whose households may see a decline in total resources.

Contrary to popular belief, families do not fall neatly into two categories: those composed of citizens and those made up of non-citizens. According to the 1997 *Current Population Survey* (*CPS*), *one in ten American children lives in a mixed-status family*: a family with at least one non-citizen parent and one citizen child. In places where immigrants are concentrated, the numbers are even more striking. (See Figure 1.) Almost two-thirds of children in families with incomes below 200% of poverty in Los Angeles, and one-third in New York, live in such mixed-status families.[17] Although citizen children retain eligibility, these families will have less money to spend on food when their non-citizen parents lose benefits. Neither the federal restorations nor many of the state food stamp replacement programs solve this problem since they do not cover working-age adults. As a result, immigrant-targeted food stamp cuts will be felt by more children—and by more citizen children—than the framers of federal policy probably intended.

But given that the non-citizen children of immigrants remain eligible for food benefits under state programs, why provide aid to working-age adults who, in the words of Texas Senator Phil Gramm, should be coming to America "with their sleeves rolled up and ready to work, not to get food stamps"?[18] The fact is, many recipients are already working: about half of all non-citizen parents in food stamp households (as well as citizen parents) have worked during the past year.[19]

Figure 1. Children in families of mixed citizenship,* March 1997



* Here, a family of mixed citizenship is defined as one with at least one non-citizen parent and at least one citizen child.

** MSA = Metropolitan Statistical Area.

Source: *Current Population Survey* (March 1997)

Further, while the welfare reform law severely limits the food stamps that able-bodied childless adults can receive, those living in areas with high unemployment who are unable to find jobs can retain their eligibility. In one of the clearest examples of discrimination against immigrants embedded in current policy, this exception is not made available to legal immigrants who lose their food stamps. They lose their benefits whether there is work to be found or not.[20]

C. Impact on New or "Future" Immigrants

Perhaps the brightest line drawn by welfare reform is not the one separating legal immigrants from citizens, but the line dividing non-citizens in the United States as of August 22, 1996, from the new immigrants arriving after that date. Welfare reform barred most new legal immigrants from TANF and Medicaid during their first five years in the United States. New immigrants also remain ineligible for SSI and food stamps since the federal restorations did not affect this group. States are free, however, to use their own funds to provide benefits to these new immigrants arriving after welfare reform.

New immigrants' access to public benefits is further constrained by new sponsor-deeming requirements, under which the income of an immigrant's sponsor is deemed available to the immigrant when determining eligibility for benefits. In practice, deeming usually works to effectively deny assistance. The new law extends the deeming period from three years until citizenship and expands deeming to Medicaid. Under previous law, deeming applied only to TANF, food stamps, and SSI.[21]

In contrast to their generous treatment of current immigrants, most states have followed the federal government's lead and have not provided substitute benefits for new immigrants. Most of the comparatively small number of states that are providing TANF and Medicaid to new or "future" immigrants have imposed sponsor-deeming requirements, which will limit the number of immigrants who receive assistance.

The size of this new immigrant population is growing rapidly—by roughly 800,000 to 1 million persons per year—and the implications of its exclusion from the social welfare state will become less and less abstract over time, especially at the state level.

D. New Time Limits on Refugees' Eligibility for Benefits

Welfare reform retains the preferential treatment historically extended to refugees by exempting them for a limited time from federal bars to food stamps, SSI, Medicaid, and TANF. Refugees' eligibility for food stamps, SSI, and Medicaid terminates seven years after arrival (and for TANF, five years after arrival) if they do not meet another exemption and do not naturalize.[22, 23] The new time limits may leave many poor refugees without access to a safety net. Approximately 59% of the 1.6 million non-citizen refugees have been in the United States for more than five years and 40% have been here more than seven years. About two-fifths of each group has incomes below 125% of the federal poverty level; the income cutoff for food stamps is generally 130% of poverty (Figure 2).[24] A recent Urban Institute study of New York's immigrant population revealed that even after five years in the United States, refugees' incomes trailed those of all other classes of immigrants—including the undocumented. The study also found that the principal source of refugees' incomes was welfare payments.[25] Further, refugees who come to the U.S. fleeing political persecution do not have financial sponsors to whom they can turn for support if they lose public benefits.

E. Impact on Immigrants Who Do Not Naturalize

Immigrants who seek to naturalize but cannot do so make up an often overlooked population excluded from public benefits. By limiting the access that non-citizens have to benefits, welfare reform introduces a strong new incentive to naturalize. The power of this incentive will be especially strongly felt among working-age immigrants ineligible for food stamps and new immigrants arriving after August 22, 1996, whose

Figure 2. Refugees in the United States by Duration of Residence and Poverty: 1996 - 1997 Averages

Population	Number	Percent
Total non-citizen refugees	1,661,969	
Non-citizen refugees residing in U.S. for more than five years	981,283	59%
Under 125% of poverty	388,386	40%
Non-citizen refugees residing in U.S. for more than seven years	702,179	42%
Under 125% of poverty	287,328	41%

Source: *Current Population Survey (CPS)* (March 1996 and March 1997) (compiled by The Urban Institute)

Note: The *CPS* does not identify refugees. These figures include non-citizens born in countries that send large numbers of refugees, including Afghanistan, Albania, Cambodia, Cuba, Czechoslovakia, Ethiopia, Haiti, Hungary, Iran, Iraq, Laos, Nicaragua, Poland, Romania, Somalia, Thailand, U.S.S.R., Vietnam, and Yugoslavia. Periods of entry vary by country.

eligibility for all major benefit programs is conditioned on naturalization.

Making citizenship the threshold for access to the welfare state has unquestionably contributed to increases in the demand for naturalization. It is well known that annual applications for naturalization have risen from 200,000 in 1991 to 1.3 million in 1996. The inducements to naturalize may have also expanded demand within segments of the immigrant population that earn less, have lower educational credentials, and speak less English than earlier cohorts applying for citizenship. Many of these non-citizens confront significant barriers to naturalizing. These barriers include waiting periods that now average 18 months across the country and reach 24 months in large immigrant-receiving cities such as Miami. During this waiting period, many immigrants remain ineligible for benefits. In addition, the fee for naturalization is scheduled to rise from $95 to $225 per person, not a trivial amount for those on public benefits.[26] Finally, immigrants must pass an English and a U.S. civics test in order to naturalize—tests that can prove quite difficult for those who have not had opportunities to learn English or who have low literacy levels in their own language.

F. Impact on Unqualified Immigrants

By barring unqualified immigrants from all "federal public benefits," welfare reform not only excludes undocumented immigrants from virtually all public benefits, it also excludes various classes of immigrants who are arguably here with the nation's consent. These include applicants for asylum and recipients of temporary protected status.[27]

While illegal immigrants have been eligible for few public benefits, a number of child-oriented services have been made available to immigrants regardless of legal status. Although the reach of new restrictions on "federal public benefits" is less broad than some observers anticipated (the Head Start and Maternal and Child Health programs are excluded), unqualified immigrants will no longer be able to use the child protective and child care services provided under the Social Services Block Grant (SSBG).[28]

Despite the fact that providing benefits to illegal immigrants is beyond the bounds of current political discourse, the undocumented represent a large and growing share of the immigrant population and a powerful demographic reality. More than one-third of the recent immigration flow and 20% of all foreign-born residents are undocumented.[29] According to Urban Institute estimates, there are more than 1 million undocumented immigrant children under age 18 in the United States.[30] While lower birth rates and increased job production in Mexico, along with stepped-up enforcement of immigration controls, could eventually slow the flow of illegal immigrants, these demographic and economic changes are not likely to be felt in the short run. Moreover, new requirements that immigrants' sponsors have incomes exceeding 125% of the poverty level could foreclose legal entry for many low-income immigrants. The new sponsorship requirements will likely shift a share of the immigration flow from legal to illegal channels. According to our earlier estimates, more than one-third of all families headed by a foreign-born person, and half headed by an immigrant from Mexico or Central America, would not meet the new sponsor income requirements.[31]

The size of the undocumented population is increasing not only because of new entrants, but because the path to gaining legal residence has become longer and more difficult. Changes under the 1996 Illegal Immigration Reform and Individual Responsibility Act (IIRIRA) have made it considerably more difficult for immigrants to acquire legal status if they have spent more than six months in the United States illegally. At the same time, strict new fingerprinting requirements introduced to screen immigrants for their criminal history have created a backlog not only in naturalization but also in green card applications. Together, these developments mean that being undocumented may become less of a transitional status than it has been historically, making the class of immigrants barred from public benefits larger and more permanent. These issues affect a significant share of the new immigrant population—at least 20% of new immigrants have entered the U.S. illegally on either their first or last trip to the U.S.[32]

III. Beyond Eligibility: Welfare Reform's Normative and Institutional Legacies

The immigrant provisions of welfare reform ushered in a host of changes that go beyond simple shifts in eligibility for public benefits. New norms, new complexity, new and inexperienced decision-makers, fewer due process protections, and expanded verification and reporting requirements have the potential to counteract the efforts to blunt welfare reform's impact described above. These shifts, and the chilling effects on benefits use that they introduce, may end up having more far-reaching impact than eligibility changes and stand as welfare reform's real legacy for immigrant policy.

A. New Verification and Reporting Requirements

In addition to shifting decision-making and fiscal responsibilities to states, the law mandates that a host of federal, state, and local institutions will have to verify their clients' immigration status for the first time. Since verification is required for all benefits classified as "federal public benefits," the reach of the new responsibilities is directly tied to the way in which federal officials define this simple but consequential phrase.[33] The potentially broad sweep of the federal requirement has been circumscribed by federal agencies.[34] In addition, federal regulations make clear that agencies need only verify the immigration status of the individual who will receive (versus applies for) the benefit. Agencies, then, need not verify the status of undocumented parents applying for benefits for their citizen children.

Institutions not mandated to verify citizenship and immigration status may nonetheless be compelled—or believe they are compelled—to do so. Although charitable nonprofit organizations are exempt from the verification requirements, the law sets up an inherent conflict: unqualified immigrants are barred from federal public benefits, but organizations that provide assistance do not have to enforce the bar. Further, the law requires verification only for federal public benefits, but bars unqualified immigrants from federal, state, and local public benefits. To comply with the law, then, states must also screen for immigration status when providing their own public benefits.

California, in particular, has taken an expansive approach to implementing this new bar on state public benefits, thereby extending welfare reform's reach beyond welfare offices to a wide array of agencies and service providers. The state will not only screen for immigration status in public assistance programs but will require all holders of California professional or commercial licenses to prove that they are citizens or legal residents before their licenses can be renewed.[35] The new requirements will affect more than three million people who are licensed by the state (the California Division of Motor Vehicles alone renews over 573,000 commercial licenses annually). As a result, state bureaucrats who license professions ranging from acupuncturists to jockeys to pest control inspectors will be forced to distinguish immigrants who are legally present from those who are not.

New verification rules have been accompanied by new requirements that certain state agencies report undocumented immigrants to the Immigration and Naturalization Service (INS). State agencies administering federal housing assistance, SSI, and TANF must report any alien the state "knows" is unlawfully in the United States to the INS at least four times a year. These new verification and reporting requirements are being introduced at the same time as new welfare reform restrictions on state and local "sanctuary laws" that bar city employees from asking about immigration status or reporting immigrants to the INS.[36] Taken together, these new verification and reporting mandates could have potentially far-reaching effects on immigrants' willingness to trust public and private community institutions. In theory, the requirements could keep eligible citizens and legal immigrants from applying for or receiving benefits, if they fear that contact with a state or local agency could lead to the deportation of an undocumented relative—again underscoring the complicated issue of mixed-status families.

B. New Complexity

Implementing new verification and reporting requirements leads to another of welfare reform's legacies: increased complexity. In fact, few immigration-related laws have required such an immense dedication of energy and resources to interpret their meaning. It is axiomatic that complexity leads to decision errors, especially when thrust upon inexperienced new actors.

In the first place, a benefit-providing agency will need to wade through both the federal INS regulations on verification *and* the more than 70 pages of draft guidelines to determine whether and how to verify status. Staff will also have to understand and implement the many new legal status distinctions the law draws among different groups of immigrants. In addition to the distinction between "qualified" and "not qualified" immigrants, eligibility may depend on, among other things, whether an immigrant entered before or after August 22, 1996, whether they or their family members have worked 40 quarters, and whether an immigrant's sponsor has signed an old or a new affidavit of support. Constantly changing immigrant eligibility rules further complicate decisions in this area.

The intricate nature of the new eligibility rules and exemptions may also lead to a misunderstanding of the law on the part of immigrants themselves. Particularly following the partial restoration of eligibility for food stamps and SSI, many immigrants have been left confused about whether they qualify for benefits. The full complexity of the new law has yet to be seen, however, as litigation over the law's many controversial provisions and differing state and federal interpretations has only just begun.

C. Changing Social Norms

Welfare reform sends a number of implicit and explicit messages that reflect changing attitudes towards immigrants' use of public benefits. Some of the simple, and misleading, messages communicated by this very complex law include:

- Immigrants—including legal immigrants—are not entitled to benefits;
- Legal immigrants will not be able to naturalize if they get benefits;
- Legal immigrants will not be able to reenter the United States if they receive benefits;
- Legal immigrants will have to repay benefits to reenter the country; and
- Legal immigrants will not be able to sponsor relatives if they receive benefits.

The shifting norms have already led to an overly broad interpretation of the law's restrictions on benefit use. Specifically, the State Department, the INS, and California and other states have misapplied public charge laws to require repayment of benefits by immigrants trying to reenter the country, obtain a green card, or naturalize.[47] California has been ordered to pay back the funds improperly collected. While the long-run chilling effects of changing norms and this controversial use of public charge have yet to be seen, data on declines in approved applications for public benefits in Los Angeles County (discussed below) provide a window into their early impact.

D. Compounding Effects of Other Policy Changes

Welfare reform's immigrant restrictions are not operating in a vacuum. Many changes occurring in other policy domains potentially limit immigrants' access to public benefits and could compound the challenges that public service providing organizations face. One example is the shift toward Medicaid managed care, which could limit immigrants' choice of health care providers by assigning them to health maintenance organizations (HMOs) that may or may not be conveniently located or offer culturally competent care. Medicaid managed care also appears to be placing additional financial burdens on public hospitals, making it harder for them to provide services to uninsured legal immigrants who no longer qualify for Medicaid.

Immigrants are not only affected by the provisions of welfare reform that specifically apply to non-citizens. Non-citizens who remain eligible for TANF will be subject to new time limits and work requirements that apply to citizens and non-citizens alike. Increased emphasis on job placement rather than education and training may have a particularly profound impact on immigrants and refugees who lack English and other job skills. It remains to be seen whether states will take into account the specific language and cultural needs of immigrants as they design their new welfare-to-work programs. Will states, for example, count English as a Second Language (ESL) classes as a work activity under TANF? In New York, there are already reports of immigrant welfare recipients being pulled out of ESL classes and put into janitorial jobs, which require few English skills and provide little opportunity for advancement.

Welfare reform's goals of restricting immigrant access to public benefits are interwoven with expanded, and arguably invalid, uses of public charge doctrine, as well as confusion over its correct application.[48] Immigrants seeking to obtain a green card must prove they are not likely to become a public charge. Use of public benefits may, but does not necessarily, affect their chances of getting a green card. However, no public charge test is applied to an applicant for naturalization, and a legitimate use of public benefits should not therefore affect an immigrant's chances of becoming a U.S. citizen. As mentioned, federal and state officials have invoked the public charge doctrine to condition immigrants' adjustment to legal status (including getting a green card) and legal immigrants' reentry into the United States on the repayment of public benefits they previously received.[39] This confusion over the consequences of benefits receipt and the misapplication of public charge rules may be magnifying the chilling effect that welfare reform has had on immigrants' use of public services.

Among the many changes introduced by the 1996 IIRIRA is a substantial reduction in the due process protections (such as judicial review) extended to non-citizens facing deportation or removal. These reduced protections could further chill immigrants' willingness to seek public benefits for which they remain eligible if it means greater exposure to deportation.

E. Chilling Effects: Data from Los Angeles County

We have suggested above that changing norms, new verification and reporting requirements, decision errors that may flow from increased complexity, overly broad use of public charge doctrine, and reduced due process protections could have a chilling effect on eligible immigrants' access to public benefits. Recent data provided by the Department of Public Social Services (DPSS) of Los Angeles County appear to support this contention.

As Table 1 indicates, between January 1996 and January 1998 there was no change in the number of newly approved citizen-headed cases or families for AFDC (now called TANF, or CalWORKs in California) and Medi-Cal in Los Angeles County. During that same time period, though, the number of non-citizen-headed cases approved for TANF and Medi-Cal fell 52% from about 3,000 approved cases per month in early 1996 to about 1,500 cases per month for most of 1997. (Overall denial rates during the period held steady.) The fall-off in applications was equally steep for the citizen children of immigrants: monthly approved applications for TANF and Medi-Cal fell by half while there was a slight increase among the children of citizens (Table 2). This sharp decline in approved cases occurred despite the fact that there was no change during this period in immigrants' eligibility for these two programs under California law.[40] As the table clearly indicates, this drop reflects a fairly steady decline over the course of the two years and is not a one-time phenomenon.[41]

The decline in approved cases is greater for households headed by legal immigrants (-71%) than for households headed by illegal immigrants (-34%) who are applying for assistance for their eligible citizen children. In both instances, though, the principal beneficiaries are typically citizen children. Similar patterns appear in the monthly approvals for county-funded General Relief and Medi-Cal only.[42]

One explanation for the sharp decline in approved immigrant cases while there is no change in newly approved citizen cases could be high levels of naturalization. That is, it may be that some immigrants are still applying for benefits, but as citizens rather than non-citizens, though it is unlikely that naturalization accounts for such steep declines.

F. The Fusion of Immigrant and Social Welfare Policy

In the wake of welfare reform, all federal benefit or support programs must be classified as being either a "federal public benefit" or a "federal means-tested benefit" for the purposes of determining immigrant eligibility. By forcing policymakers to classify all benefit programs in these terms, virtually all social policy actions will need to confront questions of immigrant policy and membership—an imperative that takes on new meaning in an era of budget surpluses. States, which must bar unqualified immigrants from their own state and local public benefits, will need to take immigration issues more explicitly into account when they address benefits policy.

This new classification system will inevitably lead to controversial results. The new state Children's Health Insurance Program (CHIP) offers a good example. Like Medicaid, the funds this block grant provides to states to expand poor children's health coverage have been defined as a "federal means-tested benefit." Thus, a state that funds a health program for poor residents with a combination of federal CHIP funds and its own revenues will be

Table 1. Cases Newly Approved for AFDC/TANF with Medi-Cal in Los Angeles County by Immigration Status of Household Head*: January 1996 – January 1998

Month/Year	Total Monthly Approvals**	Citizens	Percent of Total	Non-Citizens	Percent of Total	Legal Immigrants	Percent of Total	Undocumented Immigrants*** (Unaided)	Percent of Total
January 1996	7,332	4,085	56%	3,177	43%	1,545	21%	1,632	22%
February 1996	7,681	4,468		3,168		1,650		1,518	
March 1996	7,970	4,623		3,283		1,588		1,695	
April 1996	7,754	4,626		3,068		1,542		1,526	
May 1996	7,450	4,520		2,873		1,403		1,470	
June 1996	6,680	4,119		2,490		1,218		1,272	
July 1996	7,900	4,726		3,089		1,548		1,541	
August 1996	5,693	3,570		2,066		1,036		1,030	
September 1996	7,953	5,078		2,808		1,420		1,388	
October 1996	7,767	5,072		2,621		1,307		1,314	
November 1996	5,833	3,833		1,951		963		988	
December 1996	5,781	4,037		1,702		529		1,173	
1/96–1/97 Percent Change	***-17%***	***-1%***		***-38%***		***-59%***		***-19%***	
January 1997	6,060	4,042	67%	1,967	32%	641	11%	1,326	22%
February 1997	5,691	3,923		1,731		564		1,167	
March 1997	5,938	4,173		1,705		532		1,173	
April 1997	5,846	4,272		1,491		457		1,034	
May 1997	5,089	3,765		1,255		444		811	
June 1997	5,262	3,819		1,387		441		946	
July 1997	5,667	4,148		1,433		476		957	
August 1997	5,689	4,170		1,457		472		985	
September 1997	6,109	4,413		1,619		505		1,114	
October 1997	6,543	4,774		1,696		489		1,207	
November 1997	4,899	3,554		1,270		368		902	
December 1997	6,257	4,466		1,702		454		1,248	
January 1998	5,669	4,072	72%	1,519	27%	450	8%	1,069	19%
1/97–1/98 Percent Change	***-6%***	***+1%***		***-23%***		***-30%***		***-19%***	
1/96–1/98 Percent Change	***-23%***	***0%***		***-52%***		***-71%***		***-34%***	

*Data are provided by "first adult" in household. This person is typically the parent. Each case usually includes one or two parents and their child(ren).

** Citizens and non-citizens do not necessarily add to the total because this total includes "other" cases, including those in which the immigration status of the household head is unknown.

*** Undocumented immigrants are not eligible for AFDC/TANF or regular Medi-Cal. Most also receive federal food stamps (excluding ineligible immigrants). Data include both single- and two-parent families.

Note: All AFDC recipients are automatically eligible for Medi-Cal. Most also receive federal food stamps (excluding ineligible immigrants). Data include both single- and two-parent families.

Source: Administrative data from the Los Angeles County Department of Public Social Services

Table 2. Children Newly Approved for AFDC/TANF with Medi-Cal in Los Angeles County by Immigration Status of Household Head*: January 1996 – January 1998

Month/Year	Total Monthly Approvals**	Citizen Children of Citizen Adults	Percent of Total	Citizen Children of Non-Citizen Adults	Percent of Total	Citizen Children of Legal Immigrant Adults	Percent of Total	Citizen Children of Undocumented Adults	Percent of Total
January 1996	11,169	6,148	53%	5,144	44%	2,741	23%	2,403	21%
February 1996	11,954	6,586		4,984		2,803		2,181	
March 1996	12,489	6,917		5,178		2,689		2,489	
April 1996	12,330	6,926		5,075		2,761		2,314	
May 1996	11,467	6,644		4,418		2,288		2,130	
June 1996	10,343	6,100		3,882		2,086		1,796	
July 1996	12,476	7,161		4,815		2,531		2,284	
August 1996	8,952	5,496		3,147		1,630		1,517	
September 1996	12,572	7,761		4,415		2,348		2,067	
October 1996	12,606	7,846		4,359		2,294		2,065	
November 1996	9,197	5,834		3,111		1,613		1,498	
December 1996	9,269	6,161		2,868		1,025		1,843	
1/96–1/97 Percent Change	***-17%***	***+2%***		***-39%***		***-56%***		***-19%***	
January 1997	9,725	6,245	64%	3,160	32%	1,203	12%	1,957	20%
February 1997	8,872	5,799		2,831		1,068		1,763	
March 1997	9,285	6,208		2,819		1,000		1,819	
April 1997	9,085	6,356		2,446		860		1,586	
May 1997	8,088	5,643		2,193		914		1,279	
June 1997	8,437	5,880		2,325		871		1,454	
July 1997	9,111	6,360		2,442		886		1,556	
August 1997	9,142	6,454		2,395		900		1,495	
September 1997	9,936	6,858		2,788		998		1,790	
October 1997	10,714	7,454		2,924		932		1,992	
November 1997	8,052	5,615		2,136		684		1,452	
December 1997	10,476	7,176		2,982		916		2,066	
January 1998	9,460	6,501	69%	2,693	28%	921	10%	1,772	19%
1/97–1/98 Percent Change	***-3%***	***+4%***		***-15%***		***-23%***		***-9%***	
1/96–1/98 Percent Change	***-19%***	***+6%***		***-48%***		***-66%***		***-26%***	

*Data are provided by "first adult" in household. In most cases, this adult is the child's parent.

** Columns do not add to the total because this total includes "others," including non-citizen children and those for whom immigration status is unknown.

Note: All AFDC recipients are automatically eligible for Medi-Cal. Most also receive food stamps (excluding ineligible immigrants). Data include both single- and two-parent families.

Source: Administrative data from the Los Angeles County Department of Public Social Services subject to the same immigrant restrictions as the Medicaid program. This means that some state health care programs that were once available to all legal non-citizens may now be barred to new immigrants.[43] By effectively restricting the states' ability to serve their poverty populations, the law defeats its own federalist goal of giving states more authority over how to spend their money.

Moreover, the new five-year bar on means-tested benefits paradoxically restricts immigrants' access to the programs they need most at the time their need is greatest. In the case of the children's health insurance program, new qualified immigrants are ineligible, even though poor immigrants are nearly twice as likely to be uninsured (52% versus 26%) as poor natives.[44] Further, immigrants' incomes are lower during their first years after arrival than they are after being in the U.S. for five or ten years.[45] Although new immigrants' sponsors have pledged to support them, paying for health care for an uninsured immigrant who falls ill can be prohibitively expensive.

G. The Devolution of Immigrant Policy

Welfare reform marks a sharp departure from the federal government's exclusive role in determining immigrants' eligibility for public benefits. Before welfare reform, states were prohibited from setting their own eligibility standards for immigrants, as Supreme Court rulings from the 1970s held that the power to discriminate on the basis of alienage (i.e., citizenship status) was reserved to the federal government.[46] The 1996 law essentially overruled this settled judicial doctrine and gave states broad new authority to determine immigrants' eligibility for benefits.

But welfare reform represents more than a simple transfer of authority to the states. It also can be viewed as a cost shift, as states choosing for political or other reasons to extend benefits to new or future immigrants must now pay the full costs. As the state food stamp experience indicates, where costs are shared between the states and the federal government, the states have been generous in retaining non-citizens' eligibility for benefits. But where there is no cost sharing, they are less generous and there is greater variation. And because many of the large immigrant-receiving states—like California and New York—have extended state-funded food stamps, for instance, the inequitable and disproportionate share of immigration-related costs they now absorb is likely to widen in the future.

Welfare reform does not represent an expansion of state power in all instances, however. While welfare reform increases state power when it comes to determining legal immigrants' eligibility for public benefits, it reduces state discretion when it comes to framing policies that deal with illegal immigrants.[47]

IV. Conclusion

In sum, even though the federal government has scaled back some of the welfare law's more draconian restrictions, welfare reform's immigrant provisions leave a number of far-reaching legacies for the nation's immigrants and for immigrant policy. In the first place, almost three-quarters of non-citizens who lost federal food stamps, most of them working-age adults, have little prospect of having their eligibility restored. The effect of this continuing ban will be forcefully felt by citizens as well as non-citizens because of the large numbers of mixed families, i.e., families with non-citizen parents and citizen children. The rapidly expanding population of immigrants who arrived after August 22, 1996, have not benefitted from Congress' second thoughts about immigrant bars to public benefit programs. They remain excluded from most such programs at both federal and state levels.

Second, welfare reform's legacies go beyond eligibility restrictions on benefit programs to encompass the law's apparently profound chilling effects. In Los Angeles County, the number of monthly approved applications from legal immigrant-headed families for AFDC/TANF fell by over 70% between January 1996 and January 1998 despite the fact that there was no change in legal immigrants' eligibility for the program. During the same time period, there was no change in monthly approved applications for citizen-headed families. This decline in applications from immigrant families does not appear to be a one-time phenomenon, as 1,000 fewer AFDC/TANF cases headed by a legal immigrant are approved each month. These declines have translated into a commensurately sharp reduction in the number of citizen children of legal immigrants who are newly approved for AFDC/TANF in Los Angeles County.

Third, welfare reform has transformed the governance of immigrant policy by devolving authority to state and local governments. As the demographic significance of immigration continues to rise, responsibility for incorporating newcomers will increasingly fall to state and local governments whose capacity and inclination to respond generously will vary widely. Immigrants in states with strong economies, developed advocacy networks, and enough sympathetic voters may end up with substantially greater access to health and nutritional benefits than their counterparts in other states.

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Endnotes

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[2] By *immigrant policy* we mean the set of policies that govern immigrants' integration after their arrival. *Immigration policy* determines the number and character of immigrants who are admitted or excluded from the United States.

[3] "Federal public benefits" include any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit or any similar benefits by which payment or assistance is provided to an individual, household, or family eligibility unit by an agency of the United States by appropriated funds of the United States. PRWORA § 401(c), Public Law No. 104-193 (1996).

[4] See, for example, Stephen Magagnini, "Suicide Illustrates Welfare Reform's Toll Among Hmong," *The Sacramento Bee*, Nov. 9, 1997; Doris Sue Wong, "Food Pantries See Sharp Increase in Demand," *The Boston Globe*, Nov. 29, 1997.

[5] This leaves out all new immigrants as well as current immigrants not already receiving benefits who would qualify for SSI because they are elderly but cannot qualify as disabled. The Balanced Budget Act of 1997, Public Law No. 105-33 (1997).

[6] The U.S. Department of Agriculture announced that, in addition to the Food Stamp Program, the food assistance block grant programs in Puerto Rico, the Commonwealth of the Northern Marianna Islands, and American Samoa are federal means-tested programs. 63 Federal Register 36,653-54 (July 7, 1998).

[7] The 18 states are California, New York, Texas, Florida, Illinois, New Jersey, Massachusetts, Maryland, Colorado, Washington, Minnesota, Wisconsin, Rhode Island, Ohio, Connecticut, Missouri, Maine, and Nebraska.

[8] The Special Supplemental Nutrition Program for Women, Infants and Children (the WIC Program) provides food assistance and nutritional screening to low-income pregnant and postpartum women and their infants as well as low-income children up to age five. Committee on Ways and Means, *1996 Green Book: Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means*, at 925 (Nov. 1996).

[9] The only exceptions are Alabama and Utah, which are not providing TANF, and Wyoming, which is not providing Medicaid.

[10] Wendy Zimmermann and Karen Tumlin, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform* (Washington, D.C.: The Urban Institute forthcoming).

[11] Based on a December 1997 report of the Congressional Budget Office (CBO), which estimated $3.66 billion in savings over six years. Congressional Budget Office, *Federal Budgetary Implication of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (Dec. 1996).

[12] The law also extends food stamp eligibility for refugees for their first seven (versus five) years in the United States, and makes certain Hmong veterans and Native Americans eligible. Agriculture, Research, Extension, and Education Reform Act, Public Law No. 105-185 (1998).

[13] It also left out a significant subset of the elderly nondisabled population: those who are 60 to 65 years old and those who turn 65 after August 22, 1996.

[14] Comments of Bonnie O'Neal, Food and Consumer Service, U.S. Department of Agriculture, at the National Conference on Immigrants and Welfare, convened by the National Immigration Law Center, Washington, D.C. (Jan. 27, 1998). This figure would have risen somewhat since several states enacted programs after this estimate was made.

[15] California, as noted, is a recent exception. In August 1998, the state agreed to extend state-financed food stamps to working-age adult immigrants. Roughly 90,000 had lost benefits in September 1997.

[16] *Current Population Survey* (March 1997) (Urban Institute tabulations). There are other, less global, reasons for the limited reach of the state programs. For example, state food stamps in one of the largest immigrant-receiving states, Texas, are conditioned on past receipt. In Texas, only those immigrants who received food stamps during the year before August 1997 were determined to be eligible. Poor immigrants who had yet to apply for food stamps, or who had received benefits at an earlier time and might have later requalified, are not eligible.

[17] *Current Population Survey* (March 1997) (Urban Institute tabulations).

[18] "Cost of Highway Bill Endangers Plan to Restore Food Stamps to Immigrants," *The Wall Street Journal*, Apr. 3, 1998.

[19] *Current Population Survey* (March 1997) (Urban Institute tabulations).

[20] PRWORA limited food stamps for 18- to 50-year-old able-bodied adults without dependents to 3 months in a 36-month period. To receive food stamps for longer than 3 months, the adult must work at least 20 hours per week or participate in workfare or another work program.

[21] The Illegal Immigration Reform and Individual Responsibility Act, passed in September 1996, provided a one-year exemption for immigrants whose sponsors did not provide support and who would consequently be without food and shelter.

[22] For TANF and Medicaid, the refugee exemption is only relevant in states that have opted to bar current non-citizens from benefits or to extend the five-year bar on new immigrants.

[23] One thrust of the food stamp restorations was to align the period of refugees' food stamp, SSI, and Medicaid eligibility at seven years.

[24] *Current Population Survey* (March 1996) (Urban Institute tabulations). The *CPS* does not permit us to examine income at 130% of the poverty level. Therefore, we use 125%.

[25] Jeffrey S. Passel and Rebecca Clark, *Immigrants in New York: Their Legal Status, Incomes and Taxes* (Washington, D.C.: The Urban Institute Apr. 1998).

[26] According to the INS web page, the increase is scheduled to take effect January 15, 1999, after the agency has demonstrated progress in reducing the backlog of citizenship applications.

[27] Temporary protected status may be granted by the Attorney General to nationals of a designated country upon a finding that the country is experiencing civil strife, environmental disaster, or other extraordinary and temporary conditions that prevent its nationals from returning to safety.

[28] To the extent these services are provided by nonprofit agencies that are not required to verify immigration status, the effects of the new restrictions will be further muted.

[29] Jeffrey S. Passel and Joan R. Kahn, *Immigration, Fertility, and the Future American Work Force* (Washington, D.C.: The Urban Institute March 1998).

[30] Based on estimates of the undocumented population in Passel and Kahn, *supra* note 29; and Rebecca L. Clark, Jeffrey S. Passel, Wendy N. Zimmermann, and Michael Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (Washington, D.C.: The Urban Institute Sep. 1994).

[31] Michael Fix and Wendy Zimmermann, *Welfare Reform: A New Immigrant Policy for the United States*, (Washington, D.C.: Immigrant Policy Program, The Urban Institute Apr. 1997).

[32] Guillermina Jasso *et al., The New Immigrant Survey (NIS) Pilot Study: Preliminary Results* (Aug. 1997).

[33] Some benefits are expressly exempted from the immigrant restrictions, such as emergency medical services funded under Medicaid. In addition, nonprofit, charitable organizations are exempt from the verification requirements.

[34] To date, only the Department of Health and Human Services has defined which of its programs are considered federal public benefits. Other agencies, such as the Department of Agriculture, have yet to do so.

[35] "Licensing to Require Legal Residency," *The Los Angeles Times*, Feb. 28, 1998.

[36] New York City fought the bar on local sanctuary laws but lost. *The City of New York v. United States*, Civ. No. 96-7758 (JGK) (S.D.N.Y. July 18, 1997). New York, Chicago, and Los Angeles—cities that collectively contain 30% of the nation's foreign-born population according to the 1990 Census—have all enacted sanctuary laws of some type.

[37] See letter from Lavinia Limon, Director, Office of Family Assistance, Administration for Children and Families, Department of Health and Human Services, to State TANF Directors (Dec. 17, 1997); and letter from Sally K. Richardson, Health Care Financing Administration, Department of Health and Human Services, to State Medicaid Directors (Dec. 17, 1997). Both letters explain that in most instances immigrants should not be made to repay benefits.

[38] "Public charge" is a term the INS and the State Department use to describe immigrants who have or will become dependent on public benefits. In practice the public charge test is used to determine whether a non-citizen should be barred from entering the United States or should be deported because of their past and expected dependence on state and federal benefits. While public charge considerations have routinely been taken into account in decisions to issue green cards, they have been rarely invoked in decisions regarding reentry or as grounds for deportation. See National Immigration Law Center, *Public Charge* (July 1997).

[39] These uses of public charge have been the subject of recent legal challenges. See *Rocio v. Belshe*, No. 97 CV 0463R (CGA) (S.D. Calif. filed March 19,1997) (class action challenging California Department of Health Services practice of colluding with the INS to demand repayment of Medicaid benefits received), cited in National Immigration Law Center, *supra* note 38.

[40] California opted to keep all qualified immigrants eligible for its AFDC/TANF (now called CalWORKs) program, using state funds to pay for new immigrants during the federal five-year bar.

[41] See Wendy Zimmermann and Michael Fix, *Declining Immigrant Applications for Medi-Cal and Welfare Benefits in Los Angeles County* (Washington, D.C.: The Urban Institute July 1998).

[42] General Relief provides cash assistance to poor persons ineligible for AFDC/TANF or SSI benefits. Medi-Cal only is provided to those persons not eligible for TANF and/or food stamps.

[43] States may use a limited amount of CHIP funds for purposes other than providing health insurance, such as conducting targeted outreach in immigrant communities. The President's FY1999 budget proposal would give states the option of making immigrant children entering the United States after August 22, 1996, eligible for CHIP.

[44] *Current Population Survey* (1995), cited in letter from Sally K. Richardson, Health Care Financing Administration, Department of Health and Human Services, to State Health Officials (Jan. 14, 1998).

[45] Passel and Clark, *supra* note 25.

[46] *Graham v. Richardson*, 403 U.S. 67 (1971); *Mathews v. Diaz*, 426 U.S. 67 (1976).

[47] The law limits state power in several ways. First, it requires states wishing to provide services to undocumented and other "unqualified" immigrants to enact a new law that explicitly announces the state's intent to do so. Second, states are barred from retaining "sanctuary laws" that prohibit state or local officials from reporting illegal immigrants to the INS. Third, the law imposes on state agencies new verification and reporting mandates. See generally, Fix and Zimmermann, *supra* note 31.

Chapter XII

Equal Employment Opportunity EEOC and OFCCP

By Nancy Kreiter

I. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964 (as amended), the Equal Pay Act, the Age Discrimination in Employment Act, section 501 of the Rehabilitation Act, and the Americans with Disabilities Act. In addition, under Executive Order 12067, the EEOC is charged with providing leadership and coordination among the federal agencies involved in equal employment opportunity issues.

Today—thirty-five years after the enactment of the Civil Rights Act of 1964 and the creation of the EEOC—headlines heralding enormous settlements of charges of widespread sexual harassment at Mitsubishi and race discrimination at Texaco remind us that our nation's promise of equal employment opportunity for all has not yet become reality. The EEOC's effectiveness in enforcing anti-discrimination laws determines the extent to which those guarantees have any real impact on the lives of American workers and their families.

In late 1994, with a new leadership team finally in place at the EEOC, Chairman Gilbert Casellas began an ambitious campaign to revitalize the agency. The results to date include a redesign of the charge processing system, revision or reversal of past policy directives, national and local enforcement plans, alternative dispute resolution, a significant decline in the backlog of cases, revamping of the performance appraisal system, unprecedented labor-management partnership agreements, and public outreach, education, and technical assistance activities.

While the agency has made significant strides, its transformation into a viable enforcement agency characterized by service, expeditious charge processing, settlement, and strategic litigation is incomplete. Casellas left the agency at year-end 1997. Following his departure, the Commission struggled to maintain its quorum, hampered by political posturing that resulted in recess appointments, unconfirmed nominees, and a leadership vacuum. Late in 1998, the Senate finally confirmed Ida Castro as EEOC Chair and reconfirmed Vice Chair Paul Igasaki and Commissioner Paul Miller. In addition, Congress approved $37 million in new spending for FY1999, the full amount that was requested and fought for by the Clinton Administration. Strong leadership and significantly increased resources are vital to completing the job of reform.

A. Policy Developments

In early 1997, Chairman Casellas announced the formation of three Commission task forces to: (1) assess to what extent the new priority charge handling system was meeting the goals of the Commission and to develop recommendations for any mid-course corrections necessary to achieve effective enforcement of civil rights laws; (2) examine the Commission's litigation strategy and recommend necessary changes in statutory, regulatory, or procedural guidance or policies; and (3) identify and examine voluntary "best" EEO policies and practices in the private sector. Approximately one year later, the reports of the task forces were released. The *Task Force Report on "Best" Equal Employment Opportunity (EEO) Policies, Programs, and Practices in the Private Sec-*

tor identifies "best" EEO practices of companies around the country and describes their approaches to address workplace discrimination issues.[1] It is a comprehensive guide on EEO policies, programs, and practices that can be a resource for employers, employees and constituency organizations. The *Priority Charge Handling Task Force and Litigation Task Force Report* outlines recommendations to enhance implementation of Priority Charge Handling Procedures (PCHP) and the National Enforcement Plan (NEP).[2] Although the recommendations address some of the critical factors that continue to limit the effectiveness of charge processing and those necessary to achieve strategic litigation, barriers to successful enforcement and litigation remain. (See Section C, Recommendations for the EEOC.)

During the second term of the Clinton Administration, the EEOC has taken a number of policy positions that promise to improve EEO law enforcement. For example, in a move that encourages employees not to waive their right to seek legal redress for acts of employment discrimination through the courts, the Commission issued a policy statement in opposition to agreements that mandate binding arbitration of discrimination claims as a condition of employment.[3] Another strong policy accomplishment was the issuance of regulations governing the procedures for federal employees' discrimination complaints.[4] Completing a multi-year process of analysis, the regulations remove layers of review and delegate decision-making to front-line employees. Along with expanded use of Alternative Dispute Resolution (ADR), these measures should ensure more expeditious complaint processing in the federal sector.

The EEOC's first foray into negotiated rulemaking resulted in a final regulation concerning the waiver of rights and claims under the Age Discrimination in Employment Act.[5] Waivers are often at issue for older workers who are the subject of downsizing and restructuring because many employers require waivers of all claims in exchange for early retirement or severance benefits. The rulemaking committee, which included representatives of the plaintiffs', management, and union bars, reached a consensus on the rule that was adopted by the Commission.

The EEOC also entered into a joint training pilot initiative with the American Bar Association (ABA) that provides for ABA attorneys from the plaintiffs', management, and union bars to share their expertise with Commission staff at the local level.[6] These *pro bono* resources provide a significant tool for enhancing the capabilities of EEOC field offices which remain critically underfunded and understaffed.

Finally, after years of advocacy and considerable input from the civil rights community, the Commission developed a Memorandum of Understanding (MOU) with the Office of Federal Contract Compliance Programs (OFCCP) that allows the OFCCP to negotiate for damages under the Civil Rights Act of 1991.[7] The enactment of the Civil Rights Act of 1991 enabled victims of intentional discrimination under Title VII or the Americans with Disabilities Act to seek limited compensatory and punitive damages. The MOU designates the OFCCP as the EEOC's agent when it identifies intentional discrimination by federal contractors as part of a complaint investigation, thus authorizing the OFCCP to negotiate for appropriate damages and creating an important interagency means of maximizing enforcement resources.

B. Enforcement Performance

1. Charge Processing

The EEOC's enforcement performance under the Clinton Administration has been decidedly mixed. Implementation of PCHP ushered in badly needed reforms. Under this new system, charges are classified into one of three categories: "A" charges, which raise issues that have been identified by national or local enforcement plans as priorities and/or involving charges where discrimination is more likely than not to have occurred, receive priority treatment for investigation and resolution; "B" charges, which require further evidence before a determination can be made, are investigated as resources permit; and "C" charges, which are considered to be so weak as to trigger early dismissal. As a result, the agency's burdensome backlog has been cut in half. Three years after implementation of PCHP, the Commission's inventory had dropped from 111,345 to 55,011.[8] Moreover, the number of cases per investigator dropped significantly from 138 to 77.[9] Currently, each EEOC district office is offering mediation as an alternative to the investigative process.[10]

The average complaint processing time has decreased from a high of 12.6 months to 10.3 months, but is still up from the FY1980 average of 3 to 6.5 months.[11] In addition, most of the agency's successful backlog reduction seems to be due to the dismissal of weaker "C" charges, rather than the satisfactory resolution of stronger "A" charges.

Most troubling is the agency's poor record in obtaining remedies for discrimination victims. The agency's settlement rate remains depressed at just under 8%, down from a 32% settlement rate in FY1980.[12] Similarly, its no-cause finding rate (the rate at which the EEOC finds that there is no cause to believe that an adverse employment decision was discriminatory) hovers at a record high of 61%, up from a 28.5% "no-cause" rate in FY1980.[13]

2. Litigation

After plunging to an all-time low level of 161 cases 2 years ago, the EEOC's litigation docket has steadily climbed to more acceptable levels, reaching 363 cases in FY1998.[14] Furthermore, the NEP has clearly led to litigation of significant issues brought under varying bases in myriad industries. Precedent-setting settlements obtained in high-profile cases—such as those challenging sex discrimination in promotions, training, work hours, compensation, performance evaluations, career development, and job assignments at Publix Super Markets ($81.5 million), pervasive sexual harassment at Mitsubishi ($34 million), and race discrimination in promotions and compensation at Texaco ($176 million)—sent a strong message that the agency was back in the business of attacking egregious employment discrimination.[15] Other noteworthy cases involved glass ceiling issues, disability claims, mental health benefits, pregnancy rights, and age and national origin discrimination. All types of industries, such as retail, financial, transportation, communications, restaurant, insurance, car rental, hotel, defense, and electronics, were the targets of these suits. However, only three equal pay cases were filed during the past two years, continuing the alarming trend of past years.[16]

For years, civil rights advocates have urged the Commission to maximize its limited resources for greater effect by increasing its investment in systemic litigation. During the second term of the Clinton Administration, the Commission more than doubled its number of class action suits (84 in FY1997 and 83 in FY1998) after it had bottomed out at an all-time low of 32 cases in 1996.[17] However, the proportion of systemic or class-based litigation remains below 30%, compared to two-thirds in FY1980.[18]

C. Recommendations for the EEOC

1. The Commission should remove the remaining barriers to effective enforcement through PCHP:

- Because there is no system-wide definition of the triage categories, the national office must develop standard criteria for determining classification of charges (extent of documentation, existence of witnesses, industry patterns, enforcement history of the respondent, etc.); and *all* enforcement staff should be trained in critical decision-making using these criteria.

- Investigators must understand that charge processing should typically culminate in settlement. Settlement between the parties must be encouraged throughout charge processing, upon receipt of charge, from time to time during investigation, and both before and after findings are issued.

- ADR must be viewed as a particular means to amicable resolution, not the only method for achieving EEOC's mandate to settle discrimination charges.

- The Commission should ensure that any alternative dispute resolution procedures include adequate safeguards to ensure fairness to discrimination victims. Participation in mediation must be fully voluntary for both parties and the mediator must have expertise in substantive EEO law. The charging parties must have the right to be represented by counsel, and any charging parties unrepresented by counsel must be given sufficient information about their legal rights and remedies to ensure informed decision-making. Lastly, mediation outcomes should be monitored to ensure that discrimination victims are properly compensated and violators properly deterred.

- Internal incentives, including performance appraisals, should promote settlement.

- The Commission must recognize that some field offices still fail to provide definitive information to individuals regarding the scope of their employment rights, including the right to file a charge of discrimination. Some offices discourage charge filing through such practices as emphasizing the perils of filing a charge, pressuring complainants to utilize state and/or local fair employment agencies, and devising procedures that preclude timely access to intake.

- The Commission should ensure appropriate referrals of charging parties to advocacy and civil rights groups.

- Service, speed, settlement, and strategic litigation should be the fundamental standards of success for appraising the performance of all senior managers, regardless of function, since there are no standard criteria for assessing particular offices or staff with regard to the impact of enforcement activity on eradicating discrimination.

2. *The Commission should take additional concrete action to attack systemic discrimination:*

- Field offices that have fulfilled the agency's mandate to litigate class and/or systemic cases should be identified in order to create a "strike force" implementation team comprised of their field managers.

- Internal incentives, including performance appraisals, should encourage litigation of cases that are particularly egregious, pertain to issues of legal precedent or the public interest, or have class and/or systemic implications.

- Resources should be reallocated to increase the development of systemic cases through directed investigations and Commissioner Charges.

3. *Litigation of Equal Pay Act cases should be a top priority of the Commission, with resources focused on systemic wage discrimination and ensuring that non-job-related criteria are not allowed to justify pay disparities between men and women.*

4. *The Commission must continue to utilize testing to identify and address serious discrimination that might otherwise go undiscovered. In the past year, the agency was forced to withstand increasing attacks on its modest pilot program on testing. Testing provides a powerful addition to the agency's complement of enforcement tools, and provides a legitimate means to get at hiring discrimination.*

5. *The EEOC should work with the OFCCP to finalize and implement the MOU that allows the OFCCP to negotiate for damages under the Civil Rights Act of 1991; the agencies should also work to expand the MOU to cover intentional discrimination by federal contractors uncovered in the course of compliance reviews, not just complaints.*

II. The Office of Federal Contract Compliance Programs

The OFCCP enforces Executive Order 11246, which prohibits discrimination by federal contractors on the basis of sex, race, color, religion, and national origin and requires contractors to take affirmative action to ensure equal employment opportunity. It also enforces section 503 of the Rehabilitation Act (imposing anti-discrimination and affirmative action requirements on federal contractors with respect to qualified individuals with disabilities) and the Vietnam-Era Veterans' Readjustment Assistance Act (imposing anti-discrimination and affirmative action requirements on federal contractors with respect to Vietnam-era and special disabled veterans of all wars). Nearly one in four American workers works for an employer covered by the Executive Order. Because the Executive Order provides for proactive reviews of contractors' compliance with EEO laws, it offers an especially valuable enforcement tool.

A. Policy Developments

Under Deputy Assistant Secretary Shirley Wilcher, the OFCCP has been a leader in defending affirmative action programs against congressional attack. The agency has been consistently vocal and visible in its education of policymakers, the media, employers, and employees about the importance of the Executive Order program as a tool for expanding equal employment opportunity in the federal contractor community.

The OFCCP launched long-overdue efforts at regulatory reform, the first updates and revisions to the Executive Order regulations since the Nixon Administration. In the first of two phases, regulations governing compliance monitoring, record retention, and sanctions were finalized and implemented. The changes significantly improve enforcement of the Executive Order in several ways. They tighten recordkeeping requirements, maintain mandatory pre-award reviews (although the threshold for triggering this review was increased), and codify the use of a minimum fixed-term (six months) debarment. Most importantly, by establishing a system of multi-tiered reviews, the OFCCP gained greater latitude in reviewing federal contractors' compliance with affirmative action requirements. This should lead to better targeting by the agency and increased numbers of employers held accountable for their workplace practices. The agency must now turn its attention to revising the regulations that govern the contents of affirmative action plans, identification of occupational segregation and wage disparities, and data collection.

Two Reagan-era initiatives that were severely criticized by civil rights organizations were finally terminated. The National Self-Monitoring Reporting System (NSMRS) and the Standard Affirmative Action Formats (SAAFS) masked important facility-level data by allowing contractors to provide a single report with overall national employment statistics.

After years of advocacy and considerable input from the civil rights community, the OFCCP developed a Memorandum of Understanding (MOU) with the EEOC that allows the OFCCP to negotiate for damages under the Civil Rights Act of 1991.[19] The enactment of the Civil Rights Act of 1991 enabled victims of intentional discrimination under Title VII and the Americans with Disabilities Act to seek limited compensatory and punitive damages. The MOU designates the OFCCP as the EEOC's agent when it identifies intentional discrimination by federal contractors as part of a complaint investigation, thus authorizing the OFCCP to negotiate for appropriate damages and creating an important interagency means of maximizing enforcement resources.

Finally, the OFCCP implemented a range of creative regional initiatives that enhance effective EEO enforcement. For example, its pilot project using African American employment testers in the banking industry in Washington, D.C., led to a collaborative partnership between banks, community organizations, and the OFCCP that resulted in the publication of a "best practices" report.[20] The testing initiative was expanded to examine the hiring of Hispanics in the Chicago area in such industries as banking, transportation, and hospitality. Employment testers will also be utilized in San Francisco or Los Angeles to audit hiring practices with regard to women. Another innovative approach has been the agency's development and implementation of a groundbreaking technique to analyze compensation structures to determine discriminatory disparities in salary. The OFCCP has consistently uncovered systemic pay discrimination against qualified women and people of color, generating millions of dollars in back pay settlements for classes of victims.

B. Enforcement

In 1997, the OFCCP conducted widespread training for all of its investigators on systemic discrimination, a practice that had been abandoned since the Reagan years. Conciliation agreements are now sought only for substantive (versus technical) violations of affirmative action requirements, and a directive was issued calling for sanctions against federal contractors who violate their own conciliation agreements. Thus, limited resources are being used more effectively to target practices that have the most impact. Furthermore, glass ceiling issues have been systematically integrated into compliance reviews.

OFCCP enforcement activity has improved. The number of compliance reviews completed climbed dramatically in the past year, despite continued insufficient staffing levels.[21] Systemic enforcement picked up significantly (a 50% increase) from its record low level in FY1996, but must still increase substantially to match the average levels attained in the previous Administration.[22] Filings of administrative complaints increased from 15 in FY1996 to 22 in FY1997, but declined to 17 in FY1998.[23] The OFCCP is hampered by the overall bottleneck of cases in the Office of the Solicitor that delays action on EEO cases recommended by the OFCCP for administrative court proceedings. The number of debarments (eight) issued by the Clinton Administration now equals the total for the Reagan and Bush Administrations combined, but is one-third less than that of the Carter Administration.[24]

C. Recommendations for the OFCCP

1. *The OFCCP should continue its vigorous defense of affirmative action and should resist efforts to undermine the reach of the Executive Order.* The agency should continue to track the continuing persistence of discrimination and educate policymakers and the public about the importance of the Executive Order program in fighting such ongoing bias. Again, the Administration's leadership in this area will be crucial if these programs are to survive.

2. *The OFCCP should complete comprehensive regulatory reform that maintains and expands the use of effective enforcement tools:*

- The agency should finalize regulations requiring annual completion of an affirmative action plan (AAP) summary. This would create a short summary of a contractor's AAP that would allow better targeting of contractors for compliance reviews while also reducing recordkeeping for contractors who are in compliance.

- Regulations should be proposed and finalized with regard to 29 C.F.R. § 60.2. These must include availability factors that account for "trainable" employees, codification of the "any difference" rule for determining underutilization, job groups based on salary ranges within EEO-1 categories, and FOIA access to affirmative action plans.

3. *The OFCCP should issue policy guidance on the requirements of federal contractors with regard to the contingent workforce that includes part-time, temporary, seasonal, leased, and independent contractual workers.*

4. *The OFCCP should take additional concrete action to attack systemic discrimination.* Regional offices that have been successful in identifying systemic discrimination should be used to create a "strike force" implementation team comprised of their investigators.

5. *In order to reduce the backlog of administrative complaints waiting to be filed, the OFCCP should work with the Secretary of Labor to obtain a commitment to increase the resources dedicated to Executive Order litigation by the Solicitor of Labor.*

6. *The OFCCP should work with the EEOC to finalize and implement the MOU that allows the*

OFCCP to negotiate for damages under the Civil Rights Act of 1991. The agencies should also work to expand the MOU to cover intentional discrimination by federal contractors uncovered in the course of compliance reviews, not just during complaint investigations.

Endnotes

[1] U. S. Equal Employment Opportunity Commission, *Task Force Report on "Best" Equal Employment Opportunity (EEO) Policies, Programs, and Practices in the Private Sector* (Dec. 1997).

[2] U. S. Equal Employment Opportunity Commission, *Priority Charge Handling Task Force and Litigation Task Force Report* (March 1998).

[3] EEOC News Release, "EEOC Releases Policy Statement on Mandatory Binding Arbitration" (July 1997).

[4] EEOC News Release, "EEOC Proposes Regulations to Streamline the EEO Complaint Process for Federal Employees" (Feb. 1998).

[5] EEOC News Release, "EEOC Issues Notice of Proposed Rulemaking on Waivers of Rights and Claims under Age Bias Law" (March 1997). The regulation was finalized in June 1998.

[6] EEOC News Release, "EEOC Releases Progress Report on Agency Reforms and Launches Joint Training Project at ABA Meeting" (March 1998).

[7] 63 Federal Register 68,764 (Dec. 14, 1998).

[8] Women Employed, *EEOC Enforcement Statistics* (1998).

[9] U.S. Equal Employment Opportunity Commission, *EEOC Summary of Enforcement Data and Budget and Staffing Information* (Aug. 1998).

[10] Statement of Paul Igasaki, EEOC Acting Chairman, before the Subcommittee on Employer-Employee Relations, Committee on Education and Labor, U.S. House of Representatives (March 1998).

[11] Women Employed, *supra* note 8.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] In *Texaco*, the EEOC intervened to ensure future compliance with Title VII of the 1964 Civil Rights Act. The agency was not part of the negotiations regarding damages.

[16] Women Employed, *supra* note 8.

[17] *Id.*

[18] *Id.*

[19] American Bankers Association, *Equal Hiring Opportunity: Helping Banks Take Affirmative Action* (July 1998).

[20] 63 Federal Register 68,764 (Dec. 14, 1998).

[21] Women Employed, *OFCCP Enforcement Statistics* (1998).

[22] *Id.*

[23] *Id.*

[24] *Id.*

Chapter XIII

Affirmative Action: Victories to Celebrate... and a Long Road Ahead

by Sarah C. von der Lippe[1]

Introduction

The tide has begun to turn on the issue of affirmative action. Despite a poisonous political environment and the maintenance of a hostile Republican majority in recent congressional elections, there is reason for optimism that equal opportunity policies can be sustained. Certainly, the programs are still needed. The evidence is overwhelming that discrimination continues to threaten the dream of equal opportunity for many Americans. Nevertheless, it is important to recognize that the tide is only *beginning* to turn. It has not done so yet. Tremendous threats to affirmative action remain. First, the judicial branch remains overwhelmingly conservative and poses a grave threat to the very existence of proactive efforts to combat racial and gender discrimination. Second, affirmative action remains under attack at every level of government. This is especially true at the state and local level, as was demonstrated by the success of Washington State Initiative 200. And, third, and perhaps most importantly, affirmative action proponents face a threat of complacency and over-confidence. After the few victories of 1998—which made maintaining affirmative action look easy—there is a very real threat that advocates and the public alike will assume that affirmative action is safe and that defending it is unnecessary. Actually, nothing is further from the truth.

I. Background

Part of the reason that there is cause to celebrate is that, at least thus far, the Clinton Administration has remained true to its commitment to "mend" but not "end" affirmative action. When this report was last published it was not clear that the Administration would stay the course on affirmative action. The "mend" portion of the President's "mend" don't "end" speech[2] gave many civil rights advocates cause for alarm. This was especially true when the Administration followed up on their statements by suspending certain affirmative action programs including the "rule of two"[3] and some types of set-asides, affirmative action mechanisms that have not been prohibited by the courts. There were also real questions about the sufficiency of the Administration's (and Democrats' and moderate Republicans') efforts to defeat Proposition 209 in California.

The political environment of the 1996 presidential election and its aftermath also provided cause for concern. After decades spent as a supporter of affirmative action, presidential candidate Robert Dole switched sides and announced his opposition to the policy. After the election, conservative Republicans proclaimed that ending affirmative action would be one of their top priorities for the 105th Congress.[4] And, as this chapter will discuss, the opponents of affirmative action did their best to make good on their threats. Fortunately, the President and key cabinet secretaries, especially Rodney Slater, Secretary of Transportation, and bipartisan congressional supporters of affirmative action proved that they could be just as tough in defending affirmative action as the opponents could be in attacking it—tougher, in fact. Against formidable odds, none of the attempts to dismantle major affirmative action programs in the 105th Congress would succeed. Even the conservatives' mean-spirited campaign to deny Bill Lann Lee his appointment as Assistant Attorney General for Civil Rights would prove to be a pyrrhic victory. The hard work of the Administration, bipartisan congressional advocates for affirmative action, and especially countless civil rights advocates made these affirmative action victories look easy. But the victories were anything but foregone conclusions.

II. The 105th Congress

There were four major battles over affirmative action during the two years of the 105th Congress. The first involved the efforts of the civil rights community to defeat a bill offered by Congressman Charles Canady (R-FL) to end federal affirmative action. The second battle, which was the most partisan and rhetorically charged, occurred over President Clinton's nomination of Bill Lann Lee to be Assistant Attorney General for Civil Rights. The third, and one that set the stage for the fourth, was the battle to defeat conservatives' efforts to kill the Department of Transportation's Disadvantaged Business Enterprise (DBE) Program. The final major fight involved the efforts of conservative Republicans to end affirmative action in higher education.

A. The Defeat of the Canady Bill to End Affirmative Action

At the very end of the first session of the 105th Congress, Congressman Charles Canady, a conservative Republican from Florida and a vocal opponent of affirmative action, attempted to move his anti-equal opportunity bill, H.R. 1909, through the House Judiciary Committee. The Canady bill, like a bill sponsored by Senator Robert Dole and Representative Canady during the 104th Congress, would have banned all affirmative action at the federal level. Deceptively labeled the "Civil Rights Act of 1997," the bill was opposed by every major civil rights group, most congressional Democrats and moderate Republicans, and the Clinton Administration. Still, in the conservative-dominated Congress, it seemed to have a good chance of passing. Yet, when the bill was brought up in the Judiciary Committee on November 6, 1997, 4 Republicans joined 13 Democrats in tabling the legislation by a vote of 17 to 9.[5]

The failed committee vote on H.R. 1909 provided a revealing look at divisions among conservative and moderate Republicans on the issue of affirmative action. Congresswoman Anne Northup (R-KY) expressed grave concerns about considering the legislation without input from African American Republican Congressman J.C. Watts (OK) and Latino Republican Congressman Henry Bonilla (TX), both of whom had expressed serious misgivings about the Canady legislation. "It appalls me that we do this without sitting down and talking to J.C. Watts and Henry Bonilla," Northup said. "It's the kind of thing that makes us look insensitive."[6] Apparently other Republicans agreed. A meeting in the Speaker's office among GOP party members the day before the Judiciary Committee vote was characterized as "contentious," with several key Republicans concluding that efforts to kill affirmative action were simply "too hot to handle."[7]

While Republican cold feet might have been the ultimate cause of the bill's demise, it is important to understand some of the forces that caused those feet to chill in the first place. The advocacy by the pro-affirmative action forces, including civil rights advocates, key congressional Democrats (especially the Congressional Black Caucus), and the White House was tremendously important. On the day of the Judiciary Committee vote, civil rights activists capped off a period of fierce lobbying by gathering in the Committee room to observe the vote. With their presence, the more than 200 national and grassroots civil rights activists that gathered to bear witness as the Committee members cast their votes made clear that the Congress would not be allowed to kill affirmative action without recrimination. And in the case of the Canady bill, the strategy worked.

B. The Bill Lann Lee Nomination

Early in the 105th Congress, President Clinton nominated Bill Lann Lee, the former Los Angeles Legal Director of the NAACP Legal Defense and Educational Fund, to be Assistant Attorney General for Civil Rights. Lee was widely hailed as an excellent choice, with support ranging from the Congressional Black Caucus and Senator Edward M. Kennedy (D-MA) to noted Republicans Colin Powell, Senator Arlen Specter (R-PA), and Los Angeles Mayor Richard Riordan. Several former Assistant Attorneys General for Civil Rights—including two Republicans—also came forward in favor of Lee's nomination.[8] Lee also had the backing of virtually every major civil rights group across the country. For example, Abraham H. Foxman, the National Director of the Anti-Defamation League, and James J. Zogby, President of the Arab-American Institute, demonstrated the breadth of the support for Lee when they joined together in drafting a letter on behalf of the nomination. Foxman signed this letter despite the fact that he disagreed with some of Mr. Lee's prior positions on affirmative action.[9] Despite this broad-based support, Lee's nomination failed in the Senate Judiciary Committee under the leadership of Utah Republican Orrin Hatch.

The most startling aspect of the battle over Lee's nomination was the transparent partisanship of the Senate conservatives responsible for killing the nomination. Committee Chairman Orrin Hatch told the Senate that *despite an otherwise admirable career* Lee should be rejected because of his support for affirmative action.[10] Lee's supporters pointed out that this standard essentially required Lee to disagree with the President who nominated him. A bipartisan group of former Assistant Attorneys General for Civil Rights co-signed a letter urging "that . . . [Lee's] views on this issue [affirmative action] not be disqualifying . . . [r]ather, it should be the nominee's qualifications that govern."[11]

Despite these entreaties, the Senate Judiciary Committee refused to approve the nomination on November 13, 1997. Had he been confirmed, Lee would have been the first Asian American to hold the Civil Rights post. Strident partisanship on just one issue—affirmative action—resulted in the denial of support for a highly qualified candidate who would have led the country on the many important issues handled by the Civil Rights Division including hate crimes, employment discrimination, discrimination against people with disabilities, pay discrimination, gender discrimination, voting rights, discrimination against immigrants, housing discrimination, equity in lending, and the conditions of prisoners and patients in mental institutions. Such was the mood of the conservatives in Congress during the 105th Congress.

President Clinton deserves credit for standing strong in the face of this formidable, if unfair, opposition. Following the Senate's refusal to approve the Lee nomination, the President demonstrated courage by appointing Lee as Acting Attorney General for Civil Rights. This unusual step carried the risk of further antagonizing conservatives—but it was the right thing to do. While appointing Lee as an "Acting" Assistant Attorney General was less confrontational than making a recess appointment over the objections of the Senate Judiciary Committee, the action was nonetheless defiant. The move did more than install Lee into the position he deserved; it served notice that the President would not be bullied on affirmative action. The importance of making this stand should not be underestimated. The President's commitment to remain strong in his support of affirmative action sent a signal to conservatives that ending affirmative action would not happen easily, and helped to set the stage for several victories in the second session of the 105th Congress.

C. The Department of Transportation's Disadvantaged Business Enterprise (DBE) Program

In the first session of the 105th Congress, the fights on affirmative action, while important, occurred in the context of committees and did not require a full vote of either house of Congress. This would change in the second session. In the early winter, the Senate turned to the consideration of a massive transportation infrastructure bill—and to another fight on affirmative action. This time, the issue was affirmative action in federal highway and transit contracting and the opponent-in-chief was Senator Mitch McConnell (R-KY). The bad news for Senator McConnell, and the good news for affirmative action proponents, was that in challenging the DBE program, Senator McConnell was also taking on Secretary of Transportation Rodney Slater and Department of Transportation General Counsel Nancy McFadden, both tireless advocates of affirmative action. Senator McConnell was also taking on the entire Congressional Black Caucus, every advocate of affirmative action both in and out of government, and a great number of white Republican women who own transportation construction firms.

It is worth reviewing the DBE debate in some detail because it was the first full congressional debate on conservatives' efforts to dismantle affirmative action programs. The DBE debate was pivotal in determining whether the momentum would be in favor of or against affirmative action. Moreover, while in the end the proponents of affirmative action prevailed, it did not happen without a huge amount of hard work. And therein lies a warning for the future. Proponents of affirmative action can be successful in defending their programs—but it will not happen by accident and success is by no means a sure thing.

The DBE program was first enacted into law in 1982 under the Reagan Administration. In 1987, again under President Reagan, the program was expanded, with women joining racial minority groups as presumptively eligible business owners. In 1991, President Bush signed a bill reauthorizing the program. The statute authorizing the program maintains that, unless the Secretary determines otherwise, not less than 10% of funds appropriated for direct federal transportation procurement and federal transportation aid to state and local highway and transit programs should be expended with small, disadvantaged business enterprises. For the most part, these small firms are owned and controlled by women and minorities; however, socially and economically disadvantaged white males are also eligible to compete in the program. The DBE program operates on a system of aspirational goals established by states and localities according to the relative local availability of qualified small, disadvantaged business enterprises. The Department of Transportation has never penalized a state or local recipient for failing to achieve its aspirational goals and the program explicitly prohibits quotas. In 1997, the DBE program was responsible for about $2 billion in contracts for DBEs in the federal-aid highway program alone. Under the new legislation, known as the Transportation Equity Act for the Twenty-First Century (TEA-21), almost $20 billion could be spent with DBEs over the next 6 years.

The DBE program is needed to achieve equal opportunity because discrimination continues to plague the transportation construction industries. Minorities constitute 20% of the population, yet minority-owned businesses represent only 9% of all construction firms and bring in only about 5% of all construction receipts. Women own one-third of all businesses, yet receive only 19% of business receipts. Construction businesses owned by whites receive 50 times more loan dollars than black-owned firms with the same equity.[12] The DBE program is intended to address these inequities—and it works. For example, in Louisiana, there are at least 165 qualified DBEs available. In the federal-aid program in FY1996, those DBEs performed approximately 160 prime and subcontracts, worth 12.4% of federal-aid highway dollars in the state. However, there was no DBE program in state highway contracting during the same period. As a result those same 165 qualified DBEs received only 2 prime contracts and 12 subcontracts worth only 0.4% of state highway construction dollars.[13]

Despite the DBE program's success, it was vulnerable to attack in the Republican-controlled Congress. First of all, the DBE program was implicated in the *Adarand v. Pena*[14] litigation. While the controversy in the *Adarand* litigation actually did not even involve the DBE program, the district court judge in the case declared the DBE program itself to be unconstitutional. The court commented that there was probably a compelling governmental interest for the program (thus fulfilling the first prong of the strict scrutiny test) but it went on to find that the program was not narrowly tailored. While the validity of the district court's decision is in question and under appeal, the fact that there had been an adverse holding about the program made it a more attractive target than other affirmative action programs. The program was also at risk because of the power of the enemies it has attracted. While generally there is little organized opposition to specific affirmative action programs, such is not the case with the DBE program. The Associated General Contractors (AGC), in conjunction with conservative legal groups, such as the Mountain States Legal Foundation and the Institute for Justice, have declared war on the DBE program. The AGC, a trade association of construction firms, is well-financed, well-organized, and very experienced at lobbying. In short, it is a formidable foe.

The work to defend the DBE program began long before the actual congressional debate on the highway and transit infrastructure bill and ultimately involved a huge amount of work by countless people. Importantly, in 1996, the Department of Transportation issued a Supplemental Notice of Proposed Rule-Making in the Federal Register. While steadfastly maintaining the constitutionality of the current DBE regulations, this notice proposed changes in the DBE program in the wake of the Supreme Court's *Adarand* decision that were aimed at improving the operation of the DBE program and rendering it even more narrowly tailored. These changes were concrete evidence of the Administration's ongoing commitment to "mending" affirmative action.

As congressional consideration of the huge transportation infrastructure bill drew near, strategic discussions about how best to defend the program heated up. Secretary Slater, aided by General Counsel McFadden and many congressional allies (especially the Congressional Black Caucus), civil rights advocates, and women and minority business groups understood what was at stake. For the first time since the conservatives had begun to attack affirmative action in earnest, there would be a vote by the full Congress on a specific affirmative action program. Everyone involved understood how critical that vote would be. If the DBE program was lost, there would be a virtual avalanche of attacks on affirmative action programs and the momentum would be against affirmative action. If the DBE program was maintained, though the attacks would certainly continue, the momentum would be on the side of the affirmative action advocates. The opponents of affirmative action also knew this. On September 26, 1997, Senator McConnell joined with the anti-equal opportunity forces and held a press conference announcing their intent to repeal all federal affirmative action beginning with the DBE program. Ward Connerly of the inappropriately titled American Civil Rights Institute, Dick Komer of the Institute for Justice, Peter Laughlin of the AGC, Anita Blair of the Independent Women's Forum, and many other foes of affirmative action appeared at this press conference and pledged their support to the McConnell Amendment.

In the House, the Congressional Black Caucus (CBC) also worked tirelessly to make the case for the DBE program. Congressman James Clyburn (D-SC), a member of the CBC and a key member of the Committee on Transportation and Infrastructure, was absolutely steadfast in his support of the program, working skillfully to broker a deal with Republican Committee Chair Bud Shuster (PA) to ensure that the DBE program would be included in the Committee bill and supported by the Committee leadership. Congressman Clyburn's leadership was tremendously important and he was supported in his efforts by the entire CBC and many other supporters of affirmative action on and off the Committee.

All during the weeks leading up to the full debate on the TEA-21 bill, the Department of Transportation worked to sway votes by providing volumes of briefing materials, statistics, and individualized and group briefings to members and their staff. At the same time, civil rights advocates and women and minority contracting organizations blanketed Capitol Hill with information, letters, briefings and, most of all, powerful, heartfelt personal stories and advocacy. Led by Wade Henderson of the Leadership Conference on Civil Rights, Nancy Zirkin of the American Association of University Women, JoAnne Payne of the Women First Legislative Committee, and Tony Robinson of the Minority Business Enterprise Legal Defense Fund, civil rights advocates were able to give faces and names to the minorities and women that own businesses and confront the discrimination of the "old boy" network every day. Congress simply could not ignore these faces and stories—even in the face of relentless lobbying by groups representing the opponents of affirmative action.

The first test of the DBE program came in the Senate. Senator McConnell's amendment to kill the DBE program was carefully drafted to avoid the allegation that conservatives were repealing affirmative action without providing something in its place. In effect, the Amendment would have replaced the DBE program with a small business development program aimed at assisting all small businesses, a move that completely ignored the underlying purpose of the DBE program: to remedy discrimination. The Amendment also involved a component aimed at extending special help to small businesses from disadvantaged areas. Interestingly, while conservative legislators frequently have denounced regulation and bureaucratic paperwork in other areas, this amendment involved a fairly prescriptive and extensive regulatory burden. For instance, it required a vast amount of new recordkeeping and reporting by recipients of federal transportation funds. In response, staff from the offices of several Democratic senators, including Senate Environment and Public Works Committee Ranking Member Max Baucus (D-MT), Senate Minority Leader Tom Daschle (D-SD), Senator Edward Kennedy (D-MA), and Senator Carol Moseley-Braun (D-IL), formed a team to organize the effort to defeat the McConnell Amendment. They distributed massive amounts of information to members and their staff and hosted several briefings to respond to questions and concerns.

Crucial help also came from Republican proponents of affirmative action. Senator John Chafee (R-RI), Chairman of the Senate Committee on Environment and Public Works (EPW), worked very hard to assemble the data and debate points necessary to defeat the amendment when it was offered. Senator John Warner (R-VA), another senior member of the EPW Committee, also prepared debating points, especially with regard to the plight of women-owned businesses. Beyond the Committee, Senators Chafee and Warner were joined by Senator Pete Domenici (R-NM), who put a tremendous amount of work into defending the DBE program and working for its preservation among other Republican senators. Senator Arlen Specter (R-PA) also proved to be a strong supporter of the program.

The Department of Transportation also redoubled its efforts to inform senators about the importance of the DBE program. Secretary Slater sent a letter to the Majority and Minority Leaders of the Senate making clear that the DBE program was a very high priority for the Administration. He stated in the letter that he "would find it difficult to recommend ISTEA [the predecessor legislation to TEA-21] reauthorization legislation to the President for signature that did not include the DBE program."[15] His threat was clear, it was real, and it was taken seriously. The efforts of the Secretary and his staff were significantly augmented by efforts of other senior officials from across the Administration. Many members of the cabinet called wavering members of the Senate and advocated for the program. Attorney General Janet Reno was especially involved in responding to constitutional concerns about the program and co-signed a letter with Secretary Slater responding to specific questions posed about the program by Senator Pete Domenici (R-NM). In addition, the White House legislative and legal staff stayed on top of the issue every step of the way, coordinating with the Department of Transportation and Senate and Committee leadership.

The Senate debate was remarkable in its emphasis on substantive issues and the lack of sharp, partisan political attacks. Unlike the debate over Bill Lee's nomination, the debate over the DBE issue tended to deal with the facts involved and not the personal motivations of the senators on either side. The debate also involved a vast amount of discussion about the evidence of discrimination in the transportation construction industry and analysis of the various court cases relating to affirmative action in minority contracting. In the end, in a win for the advocates of affirmative action, the McConnell Amendment was defeated by a strong vote of 58 to 37. Several mainstream Republicans joined the vast majority of Democrats in defeating the McConnell Amendment, including: Senators Chafee (R-RI), Warner (R-VA), Bond (R-MO), Campbell (R-CO), Collins (R-ME), D'Amato (R-NY), Domenici (R-NM), Jeffords (R-VT), Kempthorne (R-ID), McCain (R-AZ), Murkowski (R-AK), Roth (R-DE), Specter (R-PA), and Stevens (R-AK).

When the debate moved to the House it was announced that Congresswoman Marge Roukema (R-NJ) would spearhead an effort to kill the DBE program when the bill came to the floor. Once again, the White House and Department of Transportation began a massive educational effort to help members understand the program. At the same time, the various nongovernmental advocates of the program worked to get the word out about the importance and efficacy of the DBE program. In the House, these forces were joined by the considerable power of the Congressional Black Caucus, the Democratic Caucus' Affirmative Action Task Force, and the bipartisan Women's Caucus and Hispanic Caucus, which held briefings and meetings for members interested in taking an active part in efforts to defend the program.

Several important leaders emerged during this process. As before, Congressman Clyburn remained very actively involved and along with the CBC helped to organize and lead the effort, but other leaders also came to the fore. House Minority Whip David Bonior (D-MI), and Representatives Corrine Brown (D-FL), Chet Edwards (D-TX), Vic Fazio (D-CA), Robert Menendez (R-NJ), Eleanor Holmes Norton (D-DC), James Oberstar (D-MN, and ranking member on the committee of jurisdiction), Bobby Scott (D-VA), and Nydia Velazquez (D-NY) all took very active roles in organizing opposition to the Amendment. Ultimately, it was agreed that Representative Ellen Tauscher (D-CA) would lead the opposition to the Amendment when the issue was debated on the floor, a task that she took on with energy and enthusiasm.

In the end, despite strong Republican support—including a long and impassioned floor speech by House Speaker Newt Gingrich—the Roukema Amendment was defeated by a vote of 225 to 194. With this victory the first attempt to repeal a specific affirmative action program went down to decisive defeat in both houses of Congress. And then the stage was set for a renewed conservative assault, this time on affirmative action in higher education.

D. The Higher Education Act

Immediately after the debate on the DBE Program was over, proponents of affirmative action were forced to fight the same battle on a new front: the Higher Education Act. Conservative Congressman Frank Riggs (R-CA) had announced his intention to offer an amendment modeled on his home state's Proposition 209 to prohibit the granting of "preferences" in public colleges and universities. In addition, other opponents of affirmative action, including Congressman Tom Campbell (R-CA), were also threatening to offer amendments to kill affirmative efforts in college and university admissions.

Stepping up to the challenge, the Department of Education, led by Secretary Riley, issued an immediate and strong denunciation of the Riggs Amendment and let it be known that it would recommend a veto of the final Higher Education bill if the bill included the Riggs Amendment. In addition, as was done in the case of the transportation bill, Attorney General Reno co-signed a letter with Secretary Riley stating that affirmative action in higher education admissions is both constitutional and good policy.

On the nongovernmental side, there was also tremendous activity. The arguments made by affirmative action proponents were familiar from the debate on the DBE program: affirmative action is fair, it works, and it's necessary. Advocates pointed out that the nation has not yet arrived at the point when affirmative action in higher education is no longer needed. They noted that while 28% of the college-aged population is made up of African Americans, Latinos, and Native Americans, only 18% of college students are members of these groups. Further, African Americans receive only 4% of doctorate degrees, Hispanics receive only 2% of doctorate degrees, and Asian Americans only 6% of doctorate degrees. While women (over 50% of the general population) receive 39% of doctorate degrees, they receive only 12% of engineering doctorates, 12% of physics doctorates, and 22% of mathematics doctorates.[16]

In addition, groups representing colleges and universities, teachers and professors, and administrators sent letters and advocates to the Hill urging that the Riggs Amendment be defeated. The American Council of Education, an umbrella group of organizations representing colleges, community colleges, professional schools, and many other organizations related to higher education, sent letters to the Hill arguing in favor of retaining affirmative action in higher education. These letters stressed that the Riggs Amendment would eliminate affirmative action programs that had already been upheld by the U.S. Supreme Court and would seriously undermine diversity in American higher education. They also expressed grave concerns about the impact the Amendment would have on the authority of state governing boards and state governments to determine the admissions standards of their public colleges and universities. Finally, they noted that the Amendment would cut off federal funds to any public college or university under a court-ordered desegregation plan.[17]

Another key factor in defeating the Riggs Amendment was the strong lobbying efforts on the part of House members themselves. While the various House caucuses had been active in the DBE debate, they were even more active in the Higher Education debate. Again, the Democratic Caucus' Affirmative Action Task Force swung into action, as did the formidable lobbying force of the Congressional Black Caucus, the Women's Caucus, the Hispanic Caucus, and other key House groups. In addition, help came from some less predictable quarters. Black Republican Congressman J.C. Watts (OK) signed on to a letter circulated by long-time civil rights activist and Democratic Congressman John Lewis (GA) opposing the Riggs Amendment. Congressman Watts had also voted against the effort to dismantle the DBE program, but this time he was more outspoken and public in his opposition to the effort to eviscerate affirmative action, and his courageous stance was important.

On May 6, 1998, the House debated the Riggs Amendment. As in the case of the anti-DBE amendment, the discussion tended to concentrate on substance rather than political rhetoric. But, as was also the case in the DBE debate, the opponents of affirmative action demonstrated an unsettling tendency to distort the issues. In his opening statement, Congressman Riggs described his Amendment and made a point of saying that it "expressly allows" single-sex schools. In fact, the Amendment as printed in the Congressional Record contained no exemption from its provisions for single-sex schools.[18] At another point in the debate, Mr. Riggs attempted to stamp his amendment with the imprimatur of slain civil rights leader Reverend Martin Luther King, Jr. Congressman Riggs' effort to paint himself an advocate of equal opportunity was brought up short by comments of Congressman John Lewis, who was a close friend of Dr. King.

One subject of the debate was the effect of ending affirmative action in the University of California (UC) higher education system. Congressman Clay (D-MO), the very able Democratic leader of the opposition to the Riggs Amendment, opened the debate on the effect of Proposition 209 on the UC system by noting that "[a]dmissions of African American, Latino and American Indian students for next fall's classes have plunged by more than half at the University of California at Berkeley; and admissions of minorities to the University of California's three law schools have dropped 71 percent for blacks and 35 percent for Latinos."[19] Congressman Riggs responded by noting that admissions of African American and Latino students at Boalt law school were up 30% in the second year of Proposition 209's application. Of course, Congressman Riggs failed to mention that admissions offered to African Americans dropped 81% and to Latinos dropped 50% in the first year that Boalt dropped affirmative action.[20] Riggs also cited statistics suggesting that minorities outnumbered white students in the UC system.[21] But Congresswoman

Maxine Waters (D-CA), Chair of the Congressional Black Caucus, responded to Congressman Riggs with a barrage of statistics showing that African Americans and Latinos were still underrepresented in the UC system. She noted that in 1997, out of 44,393 students on 9 UC campuses, only 1,509 were African American and 5,685 were Latino. In 1998, those numbers had fallen even further to 1,243 African American students and 5,294 Latino students. She went on to emphasize that the drop in minority admissions was even worse at the UC system's most prestigious campuses. African American undergraduate admissions dropped 66% at Berkeley, 43% at UCLA, 46% at UC San Diego, and 36% at UC Davis. Latino undergraduate admissions dropped 40% at Berkeley, 33% at UCLA, 20% at UC San Diego, and 31% at UC Davis.[22]

In the end, despite a floor statement urging passage of the Amendment by conservative Republican House Majority Leader Richard Armey (R-TX), the Riggs Amendment was defeated by a vote of 249 to 171. Both African American Republican J.C. Watts and Hispanic Republican Henry Bonilla, as well as Republicans such as Representatives Tom Davis (R-VA), Nancy Johnson (R-CT), Sue Kelly (R-NY), Joseph McDade (R-PA), and Bill Young (R-AK), voted with the overwhelming majority of Democrats to defeat the Riggs Amendment. Again, the work of the civil rights groups, the Administration, and congressional Democrats and their allies in the GOP paid off. Affirmative action opponents read the writing on the wall, determined that a similar battle in the Senate would be futile, and there was no comparable amendment offered during the Senate consideration of the Higher Education Act.

These four congressional battles reveal a great deal about the future of affirmative action. First, the results of the battles indicate that affirmative action can be maintained—it is not the doomed policy opponents believed it to be in 1995. On the other hand, these narratives should give proponents of affirmative action pause. In every case, these debates required the full attention of key cabinet officials and their highest ranking lieutenants. Cabinet members themselves were involved in these debates, making strategy, taking positions, and making personal calls to members of Congress. Even the President and the Vice President were personally involved in defending affirmative action. The fact is, it took an administration resolved enough to twice threaten the veto of major legislation to successfully defeat these attacks on affirmative action. This type of involvement at the highest level of the government should not be underestimated—it made a huge difference and without it, these debates might have ended differently. The Clinton Administration deserves a great deal of credit, especially Transportation Secretary Rodney Slater who was in the difficult and pivotal position of making the first stand against an organized onslaught on a specific affirmative action program. Secretary Riley and Attorney General Reno also deserve praise for the seriousness with which they approached this issue and the responsiveness they exhibited. But this is also a cautionary tale, for without this sort of vocal and energetic support, this article might be describing the demise of two of the most important federal affirmative action programs. The story of affirmative action in the 105th Congress makes it clear that who occupies the White House matters.

In addition, the awesome amount of work poured into these debates by members of Congress cannot be underestimated. A core group of members in each house of Congress decided that affirmative action had to be defended and they stood their ground. They worked hard to muster the evidence and arguments to win the floor debates against those hostile to the policy. And the integrity of the Republicans who crossed party lines and voted with the Democrats to maintain affirmative action must be recognized.

Finally, the extraordinary advocacy by countless members of civil rights, contractor, labor, and education groups was also indispensable. Often working with tiny budgets and forced to respond simultaneously on several fronts, the advocates of affirmative action came through with flying colors. They helped to provide the data and arguments that members needed to explain their votes. They worked at the grassroots levels to help to demonstrate the broad-based support for affirmative action to wavering members of Congress. And most importantly, they put a human face on the policy of affirmative action. Without their efforts, the debate might have turned out differently.

The moral of the affirmative action story of the 105th Congress is that the battle to preserve the policy can be won, but it takes vigilance and hard work from everyone who supports affirmative action. No one should believe that because some of the victories of the 105th Congress *looked* easy, they were easy. Nothing is further from the truth and remembering this fact will be essential to ensure victories in the future.

III. Executive Branch Actions

During the two years since the last Citizens' Commission report was issued, the Clinton Administration has set about fulfilling its promise to "mend," but not "end" affirmative action. While the impact of these actions cannot yet be evaluated, they must be mentioned. The Clinton Administration has undertaken an enormous task in attempting to review and reform the various federal affirmative action programs throughout the government. Among the programs that have already been reformed are the direct federal procurement program, NASA's contracting procedures, the Energy Department's subcontracting procedures, the Environmental Protection Agency's Fair Share program, and a number of training and scholarship programs. The Department of Transportation is expected to issue a final rule in its Disadvantaged Business Enterprise Program later this winter. All of these efforts are targeted at improving the operation of affirmative action, ensuring that the programs operate fairly and can withstand constitutional scrutiny, and increasing the flexibility of affirmative action efforts. While a comprehensive review of the Administration's efforts is beyond the scope of this article, it is worthwhile to review two of the larger efforts—affirmative action in direct federal procurement and the Department of Transportation's DBE program—in order to get a sense of the scope of the task and the direction the Administration is taking.

A. Affirmative Action in Direct Federal Procurement

Perhaps the most daunting task the Administration has undertaken this year is its reform of affirmative action in direct federal procurement throughout the government. Basically, the reform effort resulted in two major changes in the system of direct federal procurement (procurement in which the federal government contracts directly with private firms as opposed to providing money through state and local governments): (1) tighter certification standards for SDBs (Small Disadvantaged Businesses); and (2) a system of price credits and benchmarking to level the playing field for SDBs competing for federal contracts. These new measures join the existing system of setting national goals for direct federal procurement of 5% for SDBs, 5% for women-owned firms, and 20% for small businesses.

On the certification front, the new rule institutes a process whereby the Small Business Administration (SBA) will replace the old system of self-certification with a new, more stringent system. Minorities will continue to be presumed to be socially and economically disadvantaged; however, the SBA must certify that the minority individual (or individuals) in question actually own and control the business seeking certification. In addition, the new rule will make it easier for non-minorities to become certified as SDBs. Firms owned and controlled by white men and women will, as in the past, be permitted to prove that they are socially and economically disadvantaged. Unlike in the past, however, individual applications for certification will be judged under the more lenient "preponderance of the evidence" standard as opposed to the previously utilized "clear and convincing evidence" standard.

In addition to changes in the certification process, the Administration has instituted a system of "benchmarking" and price credits as methods of remedying discrimination in federal procurement. Essentially, the Department of Commerce has established a complex database intended to allow an analysis of the levels of participation of minority firms in various industry categories in federal contracting. Through this database, the federal government can determine those industries in which minority participation in contracting reflects the effects of discrimination. In those areas in which the statistics suggest discrimination, SDBs will be eligible for a price credit of between 0% and 10% in order to level the playing field.[23]

It is difficult to determine how well this proposed system will work since it has only just been instituted. Certainly, concerns about the system have already been raised on both sides of the affirmative action debate. For instance, from the perspective of affirmative action advocates, it is unclear whether the system can account adequately for past suppression in the formation of minority-owned firms caused by discrimination. It is also unclear whether the database constructed by the Department of Commerce accurately reflects the number and ability of minority- and women-owned businesses ready, willing, and able to contract with the government. Nevertheless, while the specific impact of the reform is as yet unpredictable, the Administration deserves praise for tackling such a huge and complex problem and devising such an innovative approach.

B. The Department of Transportation's Disadvantaged Business Enterprise Program

The Department of Transportation's DBE program presents an opportunity to consider affirmative action in a very different context. The DBE program does not operate in direct federal procurement; instead it operates primarily at the state and local levels. In addition, unlike the SDB program, the DBE program includes women-owned (not just minority-owned) firms as presumptively eligible for certification as DBEs. The final regulations on the DBE program have not yet been issued and it is impossible to predict with any certainty what the final rule will look like. Nevertheless, the Supplemental Notice of Proposed Rule-Making (SNPRM) for the DBE program issued in May 1997 was extremely detailed and provides a good sense of what some of the changes in the final rule will include.

Judging from the SNPRM, the main goals of the Department of Transportation in reforming its regulation are to make the DBE program more narrowly tailored, more flexible, and more effective. One change being proposed is to give priority to race- and gender-neutral measures aimed at addressing discrimination. The SNPRM suggests that race- and gender-neutral mechanisms should be used as the method of first resort in achieving goals. Second, the proposed rule sets out explicit guidance for states and localities on goal setting to ensure that all goals are closely tied to the actual availability of ready, willing, and able DBEs. Third, the SNPRM proposes the use of waiver provisions to allow state and local recipients to respond to local needs and conditions while still achieving the overall goals of the program. Fourth, the SNPRM provides clarified guidelines and more uniformity for white males attempting to make a showing of social and economic disadvantage. Finally, the proposed rule provides greater opportunity to challenge questionable certifications of DBEs. For instance, the SNPRM suggests a net worth threshold that would operate to rebut the presumption of economic disadvantage and explicitly includes a provision whereby the Department may challenge certifications made at the state and local levels.

Since the final DBE rule has not been issued, much less implemented, it is impossible to determine what its effects will be. What can be said is that the SNPRM represents a serious and thoughtful effort to mend but not end the program, combining new local flexibility with important new components aimed at making the program more narrowly tailored.

IV. A Note About Affirmative Action at the State and Local Levels

This report is intended to cover the civil rights record of the Clinton Administration, and therefore a detailed discussion about the various initiatives dealing with affirmative action at the state and local levels is beyond its scope. Nevertheless, the fight to maintain affirmative action is a national one with battles at every level of government, and the efforts of the President and the Administration will be terribly important in local contests as well as national ones.

The significance of local initiatives is demonstrated by the recent success of Initiative 200 in Washington state. The relevant text of Initiative 200 stated:

> *BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON: NEW SECTION. Sec. 1. (1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.*[24]

The passage of the Washington State initiative proved what affirmative action proponents already knew: Americans support affirmative action—but they are concerned about "preferential treatment." In other words, the American people are on the side of fairness. So when the language in an anti-equal opportunity initiative makes clear that affirmative action will be eliminated, the initiative is defeated.

For this reason, opponents of affirmative action have employed a strategy of using vague and misleading language to win. When initiative sponsors are not permitted to use such tactics they lose, just as they did when they put forth an anti-affirmative action initiative in Houston in 1997. There, the anti-affirmative action forces wanted an initiative that stated:

> *The City of Houston shall not discriminate against, or grant preferences to, any individual or group on the basis of race, sex, color, ethnicity, or national origin, in the operation of public employment and public contracting.*

Ultimately, the initiative actually placed on the ballot read:

> *Shall the Charter of the City of Houston be amended to end the use of Affirmative Action for women and minorities in the operation of City of Houston employment and contracting including ending the current program and any similar programs in the future?*

Clearly, the final wording of the Houston initiative, which failed to attract a majority of support from voters, was more descriptive of its proponents' intentions. It made clear that the purpose of the amendment was to kill affirmative action. The alternative advocated by the opponents of affirmative action—and the successful initiatives in Washington State and California—relied upon the term "preferences" (a term without legal definition and with strong negative connotations) without describing what that term means or what programs it includes. The Washington State initiative, like California's, says nothing about dismantling affirmative action, and yet that is exactly what its proponents intend to do.

What all of this demonstrates is that voters can be misled by disingenuous political rhetoric. The effort to mislead is all the more clear in the context of the Washington State initiative, where, as they did in the case of California Proposition 209, the anti-affirmative action forces went a step further by calling themselves "civil rights advocates" and invoking the heroes of the civil rights movement. In Washington State, proponents of Initiative 200—like their compatriots in the Congress—frequently invoked the name and words of Dr. Martin Luther King, Jr. In fact, their tactics were so shameless that Coretta Scott King, the slain civil rights leader's widow, was compelled to issue the following statement:

> *Because my husband's own words have been misused to support an initiative that would destroy his work and legacy, I feel compelled to speak out against this dangerous proposal. I-200 threatens a retreat from the goal of equal opportunity to which my husband and countless others committed their lives.*[25]

Ward Connerly, Chairman of the American Civil Rights Coalition, the California-based group behind the initiatives in California, Houston, and Washington State, has made clear that his group intends to press forward with more initiatives in other states and localities. Proponents of affirmative action will have their work cut out for them as they continue to work to defeat these misleading and counterproductive measures.

V. Conclusion

Affirmative action can and must be preserved. It is a sorely needed and effective response to current discrimination and the current effects of past discrimination. Importantly, it is also supported by the American people as a thoughtful and appropriate response to ongoing discrimination and the current effects of past discrimination. Nevertheless, the opponents of affirmative action will continue their attacks. Apparently they see the potential for political gain in undermining the very programs which have done so much to provide genuine equal opportunity to so many people. Often these opponents of affirmative action use politically divisive tactics and confusing and distorting language to win their case. Often their campaigns will be better funded and more tightly organized than those on the side of affirmative action. For all these reasons, proponents of affirmative action must take pride in recent victories while simultaneously and realistically appreciating the hard work involved in winning. If the success is to continue there will be a great deal of work yet to come.

Endnotes

[1] Several people have provided invaluable assistance in the genesis of this article and I owe them a great deal of gratitude. Thank you, David Goldberg, Diane Gross, Helen Norton, Richard Jerome, Brian Komar, Julie McGregor, Ann von der Lippe, Robert von der Lippe, Nancy Zirkin, and Corrine Yu.

[2] Speech by President William Clinton, at the National Archives (July 19, 1995).

[3] The "rule of two" was an affirmative action mechanism used by the Department of Defense. It provided that, under certain circumstances, when there were at least two qualified and competitive small disadvantaged businesses (SDBs) interested in bidding on a particular contract, that contract could be set aside for bidding only by SDBs. This practice has now been suspended.

[4] Carroll Doherty, "Senate Conservatives Begin to Plot the Dividing Lines of 1998," *Congressional Quarterly*, at 2745 (Nov. 8, 1997).

[5] Helen Dewar, "Republicans Mix Signals on Affirmative Action," *The Washington Post*, Dec. 14, 1997, at A18.

[6] *Id.*

[7] Dan Charney, "Affirmative Action: GOP Finds Issue Cuts Both Ways," *Congressional Quarterly*, at 3064 (Dec. 13, 1997).

[8] Darlene Superville, "Supporters of Lee Want Nobody Else," *Associated Press Internet*, Nov. 12, 1997.

[9] Letter from Abraham H. Foxman and James J. Zogby, to Senator Spencer Abraham (undated).

[10] Darlene Superville,"Civil Rights Nomination in Trouble," *Associated Press Internet*, Nov. 6, 1997.

[11] Superville, *supra* note 8.

[12] U.S. Department of Transportation, "Myths and Facts: DOT's Disadvantaged Business Enterprise Program," at 1 (undated) (fact sheet produced by the Department of Transportation).

[13] *Id.* at 2.

[14] 515 U.S. 200 (1995).

[15] Letter from Secretary of Transportation Rodney E. Slater to Senate Majority Leader Trent Lott (Oct. 20, 1997).

[16] Letter from the Leadership Conference on Civil Rights, signed by Wade Henderson and Nancy Zirkin, at 2 (Apr. 27, 1998).

[17] Letter from Stanley O. Ikenberry, President of the American Council on Education, to members of the U.S. House of Representatives (Apr. 27, 1998); letter from Stanley O. Ikenberry to membership organizations (Apr. 23, 1998).

[18] 144 *Congressional Record* H2893 (May 6, 1998).

[19] *Id.* at H2895.

[20] Michelle Locke, "California Law School Sees 1 New Black," *Associated Press Internet*, Aug. 18, 1997.

[21] 144 *Congressional Record* H2896-7 (May 6, 1998).

[22] *Id.* at H2902.

[23] Description of SDB program culled from undated Administration documents describing the reform of the program and conversations with Administration staff.

[24] The Official Initiative 200 Homepage, *http://www.i200.org*. The remaining text of the Initiative reads:

(2) This section applies only to action taken after the effective date of this section.

(3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.

(4) This section does not affect any otherwise lawful classification that:

(a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or

(b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or

(c) Provides for separate athletic teams for each sex.

(5) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

(6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(7) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.

(8) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Washington antidiscrimination law.

(9) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law, the United States Constitution, or the Washington state Constitution, the section shall be implemented to the maximum extent that federal law, the United States Constitution, and the Washington state Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

NEW SECTION. Sec. 2. This act shall be known and cited as the Washington State Civil Rights Act.

[25] Joni Baiter, "Separating Fact from Fiction on This Misleading Measure," *Seattle Times*, Nov. 1, 1998, at Opinion/Editorials page.

Chapter XIV

The Clinton Administration's Record on Equal Educational Opportunity in Elementary and Secondary Education

by Dennis Parker

Introduction

In its most recent report, the Citizens' Commission on Civil Rights focused on the Clinton Administration's efforts in the area of elementary and secondary education and concluded that there was a need for the appointment of a vigorous Assistant Attorney General for Civil Rights, as well as for the development of an aggressive agenda to further educational equity in the Civil Rights Division's Educational Opportunities Section.[1]

President Clinton's attempts to meet the first need ran into difficulties with his nomination of Bill Lann Lee for the position of Assistant Attorney General. Despite Lee's seemingly impeccable credentials as a practicing civil rights attorney with decades of litigation experience with the NAACP Legal Defense and Educational Fund, Inc. and other civil rights organizations, the nomination ran into fierce resistance from Orrin Hatch, Chairman of the Senate Judiciary Committee, and others who took exception to Lee's prior support of affirmative action.

After Lee's nomination seemed hopelessly mired in Congress, on December 15, 1997, President Clinton appointed Lee as Acting Assistant Attorney General, citing the pressing need to fill the position and promising to resubmit his nomination in the coming year.[2]

Although Acting Assistant Attorney General Lee has not publicly highlighted primary and secondary education as an area of special emphasis for the Civil Rights Division,[3] a number of structural and organizational changes have been made in the Educational Opportunities Section since his appointment. Among these was the appointment of Thomas Perez as Deputy Assistant Attorney General overseeing the work of the Section. Under Perez' supervision, new supervisory positions have been created, along with a change in procedures designed to increase the level of the Section's outreach efforts, coordinate its activities, and most importantly, attempt to recast the Department from the more defensive stance in which it has found itself in recent years to a more aggressive and affirmative agent in the enforcement of civil rights.

Although it is too early to assess the effectiveness of any changes resulting from this change in emphasis in the Department's mission, the discussion below will consider some of the activities of the Department since the last Citizens' Commission report, with an eye toward assessing the effectiveness of past Department actions and suggesting ways in which the Department might best use its resources to protect hard-fought gains in the area of educational equity.

I. Unitary Status

The Justice Department's resolve to take a more proactive stand in enforcement in school desegregation matters, as well as in the use of its resources, will likely be tested by the spate of unitary status proceedings currently pending and anticipated to be filed over the next few months. As was the case at the time of the most recent Citizens' Commission report, the majority of the cases upon which the Section has been working are decades-old school desegregation cases. As in the past, much of the work done by the Section deals with enforcement and modification of earlier desegregation orders. Increasingly, in the wake of the Supreme Court opinions in *Oklahoma City Board of Education v. Dowell*[4] and *Freeman v. Pitts*,[5] however, the Justice Department and other plaintiff parties in school desegregation cases will be facing hearings intended to determine whether desegregation orders should be dissolved and the underlying cases dismissed.

The impetus for these proceedings comes partly from the defendant school districts themselves, but also from the district court judges presiding in the individual cases.[6] For example, on February 12, 1997, Judge Myron Thompson of the United States District Court, Middle District of Alabama, "[b]eing of the opinion that the parties should now move toward 'unitary status' . . . and for the termination of the litigation" in 12 cases[7] pending before him, entered an order in those cases requiring the Justice Department to shepherd the parties through proceedings aimed at resolving any remaining questions of vestiges of discrimination in order to facilitate findings of unitary status in the school districts.

In the months that followed, the Justice Department and the attorneys for the private plaintiffs[8] engaged in extensive discovery and site visits to the individual school districts. The results of this careful examination of the school districts both vindicated the need for aggressive enforcement action by plaintiffs and demonstrated the way in which meaningful relief can be obtained even at a late stage in the litigation history of cases. Although each of the districts was different and many of them did well in a number of areas, all of the school districts proved to have serious racial disparities in certain areas relating to quality of education. These included the disproportionate assignment of African American students to certain special education categories and white students to gifted and talented programs, as well as wide disparities by race in the areas of discipline, graduation rates, and participation in extracurricular activities.

In each of the 12 cases, a consent decree was entered into which provided for the school districts to obtain unitary status in those areas in which the vestiges of discrimination had appeared to have been eliminated. At the same time, the orders required the districts to address the racial disparities by, among other things: (1) requiring the defendants to undertake additional remedial measures including formulating policies to address in-school segregation; (2) evaluating curricula to assure multicultural content; (3) increasing the number of African American faculty and staff through changes in recruitment, promotion, and retention policies; and (4) requiring data collection and analysis designed to reduce the possibilities of discrimination in discipline, dropout and graduation rates, and extracurricular activities.

Although the results obtained in these 12 cases were generally positive, the sudden revitalization of so many cases has the potential of taxing the Department's resources. These pressures will continue in the foreseeable future. On July 18, 1998, just as negotiations were winding down in these 12 cases, Judge W. Harold Allbritton, also of Alabama's Middle District, entered an order in 18 additional cases.

In addition to cases of this type in which jurisdiction was retained, at least in great part, by district courts, the Justice Department has been involved in a number of cases that present the question of the way in which termination would occur. Two of these cases, one of which was settled in 1998 and one of which is ongoing, illustrate the issues that the Department will be facing in the near future.

The cases, which arose in Indianapolis and St. Louis, respectively, were among the few cases in which it was determined that interdistrict relief was warranted despite the restrictions on such relief imposed by *Milliken v. Bradley*.[9] Indianapolis had been operating under a plan whereby students in selected areas of Indianapolis were transported to particular suburbs and given the opportunity to participate on the school boards of those suburbs. Although initially opposed by the suburbs (referred to as townships), the program eventually won their support. This was at least in part because they received funding from both the state and Indianapolis to accommodate the children from the Indianapolis zone.

After the district court denied a challenge from Indianapolis seeking the return of the students, the Seventh Circuit reversed and remanded the case, holding that the transfers were never meant to be permanent.[10] Just prior to the hearing, the Justice Department and the defendants entered into an agreement under which the busing of some 5,500 African American students from Indianapolis would be phased out one grade per year. Moreover, included in the decree was a commitment by the Indianapolis Housing Agency to take steps to assist low-income and minority families in finding housing in the townships, thereby reducing the residential segregation that would exacerbate the effect of returning students to the Indianapolis school district.

Although the plan was one of the few that specifically included housing remedies, reactions to it were not unanimously favorable. Professor Gary Orfield, a Professor of Education and Social Policy at Harvard University and a renowned expert in the area of school desegregation who had been hired by one of the townships seeking to continue the transfer program, regarded the Justice Department as having unnecessarily compromised a strong case. He argued that housing measures should complement, rather than replace, the existing programs, and that the plan would relegate Indianapolis students to an "extremely inferior" school system.[11]

Similar issues about the long-term effects of the end of school desegregation orders are present in ongoing negotiations in the St. Louis school desegregation case. There, the Justice Department, along with the NAACP plaintiffs, are attempting to resolve a number of issues dealing with addressing deficiencies in the ailing St. Louis school district and the future of a student transfer program between St. Louis and 16 nearby suburbs.

Given the apparently inevitable movement toward the dismissal of these school desegregation cases, the decisions that the United States makes in either resisting unitary status orders, or negotiating exit agreements, will have a profound effect on the future of desegregated schools in the country. Maintaining a long-term view of these concerns will have to remain a priority of the Department.

II. Preservation of Race Consciousness in Educational Decision-Making

In contrast to their activities in existing school desegregation cases, the Justice Department has been relatively circumspect in its involvement in cases involving attacks on school programs that consider race affirmatively in making admissions decisions. The prediction in the most recent Citizens' Commission report that there would likely be an increase in the number of cases challenging attempts to increase racial diversity[12] has proven accurate. In the past year, there has been a proliferation of cases attacking the consideration of race in admissions brought both in court and before administrative agencies. Cases have been brought nationwide, including Arlington County, Virginia; Buffalo; DeKalb County, Georgia; Houston; San Francisco; New Orleans; and even, curiously, in Charlotte-Mecklenberg, North Carolina, which remains under court order in the historic *Swann v. Charlotte-Mecklenberg*[13] case.

So far, the results of these cases have been ominous. Nonetheless, there are some cases that suggest the concept of promoting educational diversity as a compelling interest still stands. In *Eisenberg v. Montgomery County*, plaintiffs challenged the use of race as a factor in the admission of students to magnet programs in a district that had never been under an order to desegregate its schools. In its decision denying a preliminary injunction, the court refused to grant the motion, citing *Regents of the University of California v. Bakke*[14] and stating that it "believes that the diversity interest remains a compelling interest in the context now being considered."[15] In reaching this conclusion, the court considered and rejected decisions holding the contrary, including *Hopwood v. Texas*[16] and *Tito v. Arlington County*.[17] For support of its position, the court cited *Wessman v. Boston School Committee*,[18] a case upholding the consideration of race in admissions to Boston Latin High School.

To the extent that the *Eisenberg* judge looked to Boston for kindred spirits, however, some of that support was undercut by the First Circuit when it overturned the *Wessman* decision on appeal. In striking down the Boston Latin admissions process, the First Circuit held that the procedure used offended the Equal Protection Clause by foreclosing individuals from consideration on the basis of their race.[19]

Notwithstanding the rejection of the particular manner in which race was used in Boston, the decision makes clear that the First Circuit was not joining its two sister Circuits that had categorically rejected the idea that diversity could constitute a compelling interest.[20] Instead, the First Circuit assumed the validity of *Bakke*, thereby putting off for another day and another court the determination of whether diversity can ever be a compelling justification for the use of race.

The participation of the Justice Department in cases dealing with the question of diversity as a compelling interest has been limited to the submission of *amicus curiae* briefs in a number of the cases (including *Tito v. Arlington*). Although these briefs have argued in support of recognizing diversity as a compelling interest, it is not clear that the United States has staked out the most aggressive position possible in defending the use of race-conscious measures in decision-making at the elementary and secondary school level. Given the imminence of a decision that might seriously compromise affirmative action policy, as well as the resources and authority that the Justice Department can bring to a case, it is hoped that the Department can argue even more firmly in favor of the use of affirmative action, by weighing in on more cases raising the issue, or even seeking intervention in the cases at the earliest possible stage.

III. Conclusion

Having initiated efforts to organize the Educational Opportunities Section and examine its docket, the Justice Department must ensure that its efforts in the future are directed to the fullest extent possible to creating and maintaining educational opportunities for all students. Such efforts will require both increasingly aggressive enforcement of existing cases and serious consideration of ways in which the United States can lend support to attempts to utilize affirmative action as a tool for furthering the interests of all students.

Endnotes

[1] Patricia A. Brannan, "The Clinton Administration Record on Equal Educational Opportunity in Elementary and Secondary Education", *in* Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration*, at 253, 257 (1997).

[2] As of the date of this writing, President Clinton has not resubmitted Lee's nomination.

[3] Mr. Lee has stated that the areas of his initial focus are to be hate crimes, housing and lending discrimination, and enforcement of the Americans with Disabilities Act. Written Statement of Bill Lann Lee, Acting Assistant Attorney General, before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives (Feb. 25, 1998).

[4] 498 U.S. 237 (1991).

[5] 503 U.S. 467 (1992).

[6] Indeed, the district court judges are finding themselves under increasing pressures to raise the issue of unitary status in cases under their supervision. One example of this is a recent mailing to judges by Linda Chavez, the President and Fellow of the conservative Washington-based Center for Equal Opportunity. Although neither Chavez nor the Center is involved as a party or counsel in the cases involved, the letter, dated October 1998, urged the judges to reactivate all of the cases pending before them with an eye to dismissing them.

[7] The 12 cases were part of the statewide case in *Lee and United States v. Macon* and included the Boards of Education of Lee County, Civil Action No. 845-E; Russell County, Civil Action No. 848-E; Tallapoosa County, Civil Action No. 849-E; Alexander City, Civil Action No. 849-E; Auburn City, Civil Action No. 850-E; Opelika City, Civil Action No. 852-E; Phenix City, Civil Action No. 853-E; Roanoke City, Civil Action No. 854-E; Crenshaw County, Civil Action No. 2455-N; Butler County, Civil Action No. 3099-N; Covington County, Civil Action No. 3102-N; and Elmore County, Civil Action No. 3103-N.

[8] Plaintiffs were represented by Solomon Seay and lawyers associated with the NAACP Legal Defense and Educational Fund, Inc.

[9] 418 U.S. 717 (1974).

[10] *U.S. v. Board of School Commissioners*, 128 F.3d 507 (7th Cir. 1997)

[11] Caroline Hendrie, "In Indianapolis, Nashville, a New Era Dawns," *Education Week*, July 8, 1998.

[12] Brannan, *supra* note 1, at 256.

[13] 402 U.S. 1 (1971).

[14] 438 U.S. 265 (1978).

[15] *Eisenberg v. Montgomery County Public Schools*, 1998 U.S. Dist. LEXIS 13901, Civil Action No. AW 98-2797 (D. Md. Sep. 4, 1998).

[16] 78 F.3d 932 (5th Cir.) *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[17] 1997 U.S. Dist. LEXIS 7932, Civil Action No. 97-540 A (E.D. Va. May 13, 1997).

[18] 996 F. Supp. 120, 128 (D. Mass. 1998).

[19] *Wessman v. Gittens*, __ F.3d__, No. 98-1657, at 26 (1st Cir. Nov. 19, 1998).

[20] See *Lutheran Church-Mo Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (ruling out diversity as a compelling governmental interest in the employment context) and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (doing the same in the context of higher education).

Chapter XV

Inclusion of Limited English Proficient Students in Title I: An Assessment of Current Practice

by Diane August, Dianne Piché, and Roger Rice[1]

Introduction

The 1994 amendments to Title I of the Elementary and Secondary Education Act contained bold, new provisions in the areas of standards, assessment, schoolwide improvement, and accountability, which taken together add up to a major reform agenda for schools serving large numbers of poor and limited English proficient students. This chapter examines district and school Title I services for limited English proficient (LEP) students and state efforts to implement the assessment provisions of the 1994 amendments as they apply to those students.[2] It also describes the evaluation and research activities sponsored by the U.S. Department of Education to monitor the implementation of Title I and to acquire new knowledge necessary to ensure effective programming for LEP students. Finally, the chapter makes recommendations for improving the way in which these key provisions of the Act are implemented.

I. Background: LEP Students and Federal Law

For decades, students with limited English proficiency have benefitted from a number of provisions in federal law prohibiting discrimination and providing for equal educational opportunities. These legal protections derive from the Fourteenth Amendment to the U.S. Constitution, as well as from statutes including Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act.[3] In addition, state and local education agencies receiving federal funds (e.g., through Title I or Title VII of the Elementary and Secondary Education Act) are obliged to adhere to the specific rules and regulations established under those programs with respect to the education of LEP students, as well as to the broader prohibition against discrimination applicable to all recipients under Title VI.

Federal aid programs such as Title I and Title VII can also provide much needed resources to schools and school districts serving large numbers of LEP students, who often are also poor. Title I is particularly important because, as the largest federal education program at the elementary and secondary level, it reaches virtually all school districts enrolling large numbers of poor LEP students. In fact, a survey found that in 1994–95, 1,482,943 LEP students were served in Title I, while about 299,000 were served in Title VII programs authorized by the Bilingual Education Act.[4]

II. Title I Requirements for the Provision of Services for LEP Students

In passing Title I, Congress recognized that: "educational needs are particularly great for . . . children with limited English proficiency . . . ." (Section 1001 (b)(3)). At the same time, Congress also recognized the importance of decentralized decision-making that would allow schools flexibility in designing and implementing instructional strategies for bringing their children to high levels of performance. The Act strikes a balance between ensuring that the needs of limited English proficient students are met, while at the same time allowing maximum local flexibility.

Under section 1112, local educational agencies (LEAs) are required to file local educational plans that describe, among other things, how services provided under Title I will be coordinated and integrated with other educational services, such as services for LEP students. State approval of an LEA plan under section 1112(e)(2) requires that the state educational agency must determine that the LEA plan will enable schools to help "all children" served to meet the school's standards. Sections 1114 and 1115 set out program requirements for two types of programs: schoolwide programs and targeted assistance programs.

Schoolwide programs allow an LEA to use Title I funds, in combination with other federal, state, and local funds, to upgrade the entire educational program in a school. The law requires that a schoolwide program include the following components: "[a] comprehensive assessment of the school that is based on information on the performance of children in relation to the State content standards and the State student performance standards"; "[s]choolwide reform strategies"; "[i]nstruction by highly qualified staff"; professional development; strategies to increase parental involvement; "[p]lans for assisting preschool children in the transition from early childhood programs . . . to local elementary school programs"; "[m]easures to include teachers in the decisions regarding the use of assessments"; and "[a]ctivities to ensure that students who experience difficulty mastering any of the standards . . . [are] provided with effective, timely assistance." (Section 1114).

A school that desires to operate a schoolwide program must, under section 1114(b)(2), develop a comprehensive plan for reforming the total instructional program in the school. The comprehensive plan must describe how the school will use Title I resources to implement the required schoolwide components. Schools that already have schoolwide comprehensive plans incorporating the required components need not develop separate Title I schoolwide plans. Under section 1114(b)(2)(A)(v), a schoolwide plan must provide for the collection of data on student performance that is disaggregated by gender, ethnic or racial groups, limited English proficiency status, and several other categories.

Targeted assistance schools served under section 1115 are schools that are ineligible for, or choose not to operate, a schoolwide program. Funds under section 1115 may be used only for programs that provide services to eligible children identified as having the greatest need for special assistance. Section 1115(b)(2) provides that LEP students are eligible for services on the same basis as other children.

III. Summary of Findings Regarding LEP Student Participation in Title I Schoolwide and Targeted Assistance Programs

A survey of eight school districts in two states indicates that districts are falling short of incorporating LEP students into Title I programs.[5] In one school district, the comprehensive school plans from 113 schools that received Title I funds were reviewed to ascertain how the needs of LEP students were being met. The plans were reviewed for any data on current LEP academic performance, measurable learning objectives for LEP students, discussion of professional development to help teachers meet the needs of LEP students, descriptions of how Title I resources were being added to address LEP student needs, and any other plans to support LEP students. In 68 of the 113 schools, the comprehensive school plans made little or no mention of LEP students at all. In 45 schools, although LEP students were mentioned, there was no comprehensive plan for providing them with the services required by law. There was a similar pattern in the remaining school districts with the exception of one. In that district, each school was required to include in its plan language proficiency test data, plans for assisting LEP students in making the transition from bilingual education to mainstream classrooms, and activities that addressed the need for professional development in second language acquisition.

School visits were conducted in four school districts to attempt to gain an understanding at the classroom level of how Title I resources were being used to benefit LEP students. The purpose of the school visits was to identify the various ways in which Title I was helping the school meet the particular needs of LEP students. The visits found that the most common uses of Title I funds were for hiring regular classroom teachers to reduce pupil-teacher ratios in regular mainstream classrooms, paying for reading specialists, and purchasing computer equipment. In some cases, schools with large numbers of LEP students used their Title I funds to add extra bilingual or English as a Second Language (ESL) teachers or paraprofessionals, or to buy computer software to assist in classes for LEP students.

LEA planning documents in these districts provided no specific detail regarding how these students were to be served. That is, districts simply stated, following the Title I law, that all students, including LEP students, would be served; no further elaboration was provided regarding specific services for LEP students or the quality of those services. How well these students are served in each school depends, to a large extent, on the decisions of the principal and staff of that particular school.

IV. Title I Requirements for Assessing LEP Students

Congress took major steps toward promoting inclusion in reauthorizing Chapter 1 (now renamed Title I) of the Elementary and Secondary Education Act in 1994. The amended Title I contains new and potentially far-reaching requirements governing the inclusion of limited English proficient students in state assessment and accountability systems. These provisions (in section 1111(b)) include:

- A requirement that LEP students be considered eligible for Title I services on the same basis as other students. Schools must now select children, including LEP children, to participate in Title I programs on the basis of uniform, objective criteria to determine which students are at greatest risk of failing to meet state performance standards.

- A requirement that all students, including students with limited English proficiency, be included in state assessments to be used for Title I purposes. These assessments, with limited exceptions, are to be the same assessments the state uses to assess the performance of all students.

- A requirement that LEP students be assessed "to the extent practicable in the language and form most likely to yield accurate and reliable information about what such students know and can do, to determine such students' mastery of skills in subjects other than English."

- A requirement that appropriate accommodations be provided. These may include extra time, allowing the use of a dictionary, or simplified or translated instructions.

- A requirement that state accountability systems pay particular attention to whether LEP students are making "adequate yearly progress."

- A requirement that assessment results be disaggregated for public reporting purposes, at the school and school district levels, "by each race and ethnic group" and "by English proficiency status," as well as by other categories.

Taken together, these and other provisions in the new Title I add up to a substantial effort on the part of Congress to ensure that this growing segment of our K-12 population is included and counted in each state's education reform and accountability system.

V. Summary of Findings Regarding the Assessment of LEP Students

The following summarizes findings relevant to limited English proficient students. The findings have been generated by an extensive review[6] of the U.S. Department of Education's regulations and guidance, and the plans for Title I compliance submitted to the Department by each state.

A. Federal Guidance

The Department's *Guidance on Standards, Assessments, and Accountability* was released in draft form in 1996, and in final form in the spring of 1997. With respect to the assessment of LEP students, the guidance contains clear statements that a) LEP students are expected to meet the same content and performance standards as other students; b) results of final assessments must be disaggregated by LEP status; and c) standards, curriculum, and assessments should be culturally inclusive.

However, the guidance stops short of an affirmative statement regarding the unambiguous legal requirement that LEP students must be assessed in content areas other than English. The guidance further fails to explicate fully the requirement that LEP students must be assessed, "to the extent practicable, in the language and form most likely to yield accurate information" on such students' knowledge and skills. Recently, however, the Department's Office of Bilingual Education and Minority Languages Affairs, in conjunction with the Title I Office, helped prepare and circulate draft guidance clarifying the legal obligation under Title I to assess LEP students "in the language and form most likely to yield accurate information on such students' knowledge and skills." However, this guidance has yet to be released by the Title I Office.[7] With respect to the requirements for disaggregation of assessment results, the Department declined to require any disaggregation during the transition period, despite having been petitioned to do so by advocacy organizations.[8] With respect to the final assessments, the Department's regulations and guidance reflect the requirements of the law.

Finally, on the question of whether schools and school districts would be held accountable for the progress of LEP students, the guidance encourages but does not actually require states to consider LEP students' progress on state assessments in establishing the systems required by the amended Title I to identify and improve failing schools.

B. State Plans

Each state plan required Departmental approval by July 1, 1996, in order for federal funds to continue to flow to the state and its school districts. Most states received only "conditional approval," and were required to cure deficiencies (often with respect to Title I accountability plans) within one year. However, according to a review of the plans,[9] the Department did not make compliance with Title I's LEP assessment requirements a condition for approving most states' plans in 1996 and 1997. In fact, the review revealed that most states did not come close to meeting the statutory requirements for inclusion of LEP students, with accommodations and native language assessments as appropriate, in the states' proposed assessment systems. Nor did the vast majority of state plans indicate whether or how school districts and schools would be held accountable for LEP students' academic progress. The following examples highlight some of these deficiencies.

1. Inclusion in Title I Assessments

An astonishing number of state plans obtained were silent on the subject of LEP students' inclusion in assessments. These included plans submitted by states with substantial LEP enrollments, e.g., Colorado, Florida, Hawaii, Maryland, Michigan, Ohio, Pennsylvania, and Washington. While many states described or at least mentioned a state policy on LEP inclusion, the vast majority of these states failed to indicate how they would comply with Title I's requirements for inclusion of LEP students, appropriate accommodations, and native language assessments.

One state that provided some encouraging information with respect to inclusion of LEP students in assessments is Alaska. Alaska's plan indicated the state had adopted a policy providing that all but those with the most limited proficiency in English are required to participate in the state assessment program. The result, according to the state's report, has been that less than 1% of LEP students in Alaska are excluded. In addition, the state provides lists of accommodations for both disabled and LEP students.

Some states, like California, Indiana, Minnesota, and South Carolina, said in their plans that they would leave decisions about whether or how to include LEP students to local school districts, leaving virtually no safeguards against unwarranted exclusion of LEP children from the Title I accountability system.

Moreover, a number of states, including Arkansas, Connecticut, Illinois, New Mexico, and Virginia, indicated that they had no plans to develop native language assessments in order to meet the law's requirement to assess LEP students "to the extent practicable, in the language and form most likely to yield accurate and reliable information on what such students know and can do." For example, Arkansas flatly refused to adopt assessments in any language other than English. In the case of New Mexico's plan, the Department's peer reviewers noted as a plan weakness that there was "[n]o mention of non-English tests except in [discussion on optional] local assessment. . . . This is a serious concern given the demographics of New Mexico."

Illinois, like several other states, said LEP students would be excluded from assessments in subjects other than English for a number of years, although the law does not expressly permit them to do so. Illinois' plan provided that it would exclude LEP students for up to three years from the IGAP (the state assessment) while they attend bilingual classes. During this time, the state planned to assess such children in English proficiency, but in no other subject (although presumably the children would be taught more than just English). The state plan explicitly admitted that Illinois "will not be translating tests into other languages for its large LEP population, and conceded that until such children were deemed ready to take the English-only IGAP, "there will be no data about mathematics ability." Likewise, Connecticut's state plan maintained that it was "not feasible to develop assessments in languages other than English" and exempts LEP students enrolled in bilingual or ESL classes for less than three years.

Virginia's state plan contained no description of how (or whether) LEP students would be included in Title I assessments, whether they would be tested in their native languages, or whether students would receive testing accommodations, where appropriate. Apparently recognizing these deficiencies, the peer review panel asked for detail on the last two issues. However, by the time the state received these comments, the Department had already approved the state plan without conditioning approval on curing these deficiencies. And when the state submitted plan amendments, it informed the Department that:

> *No process has been established by the state to identify languages other than English that may be spoken by students, regardless of the programs under which they may be served (e.g., Title I, Part A). Local school divisions, however, bear the responsibility of putting into practice the processes and procedures necessary to enable effective communication both in the provision of academic and educational services to students, and between the schools and parents.*
>
> *Based on the Virginia Constitutional provision that English is the language of the Commonwealth, it has been the consistent direction of the Board of Education that assessments will be provided in English only . . . .*

Although an undated Department staff memo indicated a "major concern" with Virginia's position on LEP assessment, no enforcement action was recommended or taken, to the knowledge of the authors.

Unlike many of their compatriots, several state plans indicated that they would develop or use native language assessments. These states include Alaska, Arizona, California, Delaware, Louisiana, Nevada, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, and Texas. In some cases these plans were inadequate. For example, a number of states, including California, placed the burden on local districts to develop or procure suitable native language assessments. Further, more than two years after states submitted these plans, many states still have not developed native language assessments.

In contrast, some states have developed native language assessments as well as comprehensive state assessment systems that incorporate LEP students.[10] Currently New York requires PEP (Pupil Evaluation Program) tests in reading and math at grades three and six. For math, LEP students who score above the 30th percentile[11] on an English as a Second Language (ESL) assessment or on a nationally normed reading test can take the assessment in English or in their native language if it is available (tests currently are available in Spanish, French, Haitian-Creole, and Chinese). Those children who score below the 30th percentile on the English assessment must take the math assessment in their native language (if available), whether or not they have been instructed in this language. This covers 90% to 95% of all students. In reading, children who don't meet this threshold can take an English proficiency assessment that measures reading, such as the Language Assessment Battery (LAB) or Language Assessment Scales (LAS), or they may use another norm-referenced test. In all cases, they must show satisfactory progress on whatever assessment they are using. The state defines satisfactory progress as five NCE gains for reading on a standardized norm-referenced test or the expected publisher's gains (calculated taking pre-test scores and level of schooling into account) for the LAB or LAS. Although New York permits other modifications for students in special education, it does not permit these modifications for LEP students because it is afraid of "throwing the norms off."

Texas uses the Texas Assessment of Academic Skills (TAAS) to monitor the progress of students in the state in grades three to eight. For children who are limited English proficient, language proficiency assessment committees at each school (composed of a site administrator, bilingual educator, ESL educator, and a parent of a child currently enrolled) make a determination about which assessment each LEP student will take. Based on six criteria (literacy in English and/or Spanish; oral language proficiency in English and/or Spanish; academic program participation, language of instruction, and planned language of assessments; number of years continuously enrolled in school; previous testing history; and level of academic achievement), the committees decide whether LEP students are tested on the English TAAS, tested on the Spanish TAAS, or exempted and given an alternative assessment. These committees also make program entry and exit decisions and monitor student academic progress following exit from special services. Those entering U.S. schools in third grade or subsequent grades are required to take the English TAAS after three years.

2. Disaggregation of Assessment Results

With respect to disaggregation requirements, only Puerto Rico and a few states clearly indicated that the results of their final assessments would be reported by all six categories required by the law (gender, major racial and ethnic group, English proficiency status, migrant status, students with disabilities compared with nondisabled students, and economically disadvantaged students compared with students who are not economically disadvantaged). These states included Alabama, Illinois, New York, Ohio, Oklahoma, Oregon, Pennsylvania, West Virginia, and Wyoming.

Many plans approved by the Department were completely silent with respect to disaggregation of final assessment results, including the District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Massachusetts, Mississippi, Montana, Nebraska, New Mexico, North Carolina, South Carolina, Tennessee, Vermont, Virginia, and Washington. Some states, like Delaware, Kansas, Kentucky, Maine, Maryland, Missouri, New Jersey, North Dakota, and Rhode Island, mentioned only some of the required categories. Others (such as Michigan and New Hampshire) stated that they would disaggregate—but did not say by which categories. Still others, like Louisiana, Minnesota, and Nevada, were unclear or vague.

3. Accountability for the progress of poor and LEP students

Many state plans, such as those of Arkansas, California, Illinois, Massachusetts, New Jersey, Ohio, South Dakota, and Wyoming, were silent on whether or how poor and LEP students would be included in the accountability system. Others, like Hawaii and South Carolina, were unclear. Some states, Vermont for example, addressed economically disadvantaged students but not those with limited English proficiency. While no state fully satisfied the law's requirements, the following states provided encouraging reports.

Alaska said it would determine adequate yearly progress by considering a combination of: "percent of all students judged proficient"; "percent of economically disadvantaged students judged proficient"; and "percent of LEP students judged proficient." The state pledged that "[s]tudent data will be disaggregated by at least LEP and economically disadvantaged and districts whose Title I students are not making adequate progress will not be able to achieve an adequate progress designation even if the schools' average progress is sufficient."

Under Arizona's plan, the state will set student achievement "milestones" which will apply "to all disaggregated subgroups (e.g., gender, ethnicity, migrant or LEP status) to ensure equal progress across groups. Advancements in student performance must be measured in this way so that *average* student performance does not mask the challenges or obstacles that may b[e] faced by children who are intended to benefit from the strategies and activities described in this Plan." However, Arizona does not require separate progress for disaggregated groups during the transitional period. Instead, the plan proposes to close, by an unspecified percentage, the gap between the baseline (the percentage of students achieving proficiency or advanced proficiency in the spring of 1996) and 100% of all students achieving proficiency and advanced proficiency. The U.S. Department of Education did not request, and Arizona never sent, any information indicating that the state had determined the requisite percentage of progress during the transition period.

In Texas, the TAAS scores, whether for the English or Spanish TAAS, are used as base indicators in the accountability rating system. In the near future, Reading Proficiency Test in English (RPTE) scores for students taking the Spanish TAAS or for those delayed in taking the English TAAS will be reported in the Academic Excellence Indicator System (AEIS) for public information. Schools are designated exemplary, recognized, acceptable, or low-performing based on student scores, and rewards and sanctions are meted out on this basis. Texas requires districts to make adequate yearly progress by attaining an "academically acceptable" rating. To gain that rating in the 1996–97 school year, at least 35% of all students within each student group (African American, Hispanic, white, and economically disadvantaged), as well as all students, must pass each section of the state assessment. The required percentage of passing students will be raised by 5% each year until 50% is reached in the year 2000.

VI. Current Research and Evaluation

The U.S. Department of Education's Office of Bilingual Education and Minority Languages Affairs (OBEMLA) is funding research that will provide information on the implementation of Title I for LEP students, as well as help states, local educational agencies, and schools implement the Act.[12] The Center for the Study of Evaluation, Standards, and Student Testing (CRESST) has received funds from OBEMLA to examine the point at which testing in a second language (English) yields valid results for language minority students acquiring English; they are also developing and evaluating appropriate assessment accommodations for these students. Other OBEMLA-funded studies include: a study to determine expected annual gains for LEP students in English proficiency and academic achievement for students in high quality programs; and a review of state policies and implementation regarding inclusion of LEP students in assessment systems.

The U.S. Department of Education's Office of Planning and Evaluation is funding research to examine the quality of Title I implementation. Performance measures will be collected through: the Longitudinal Evaluation of School Change and Performance that will analyze the extent to which curriculum and instruction are changing in leading reform states and the impact on classes serving Title I students; national surveys at the school, district, and state levels to examine implementation against the goals and strategies identified in plans at each level and how plans are used, implemented, revised over time, and reflected in policies and profiles of school progress; a national longitudinal survey that will examine the extent to which Title I schools are adopting schoolwide approaches, what goes into planning, how schools reconfigure instruction and services, and the impact on students; a targeting and resource allocation study; an evaluation of Title I in Ed-Flex States to examine the impact of statewide waivers related to Title I (e.g., the expansion of the schoolwide option to all Title I schools) and how states monitor performance; targeted studies to address additional issues including services to migrant students; and a national evaluation of Even Start, the intergenerational literacy program. Because many of the studies have not yet been completed, it is unclear whether and how well they will examine the extent to which LEP students have been incorporated into Title I activities at the state, local educational agency, and school levels.

VII. Recommendations for Improving Title I Services for LEP Students

Our analysis points to an urgent need for improvements in the services provided to LEP students through Title I and in state efforts to incorporate LEP students in state assessment and accountability systems. Moreover, research is needed to provide additional information about the extent to which and how well these students are being served under Title I, as well as the best methods to fully serve them. Almost all the current public information on LEP students and Title I comes from studies funded through non-federal sources. Recommendations follow in the areas of provision of services, assessment, and evaluation and research.

A. Provision of Services for LEP Students

By requiring that the needs of all students be met, the current Title I law can be read as broadly inclusive of LEP students. However, there is a need for additional language in the Title I regulations to ensure that LEP inclusion becomes a reality and not merely a paper assurance. In particular, 34 C.F.R. §§ 200.9(d)(2)(iv) and (e) should be amended to include a requirement that the school "demonstrate through Title I resource allocations and program description how its instructional program will specifically allow the school to meet the needs of limited English proficient students through the provision of staff who are specially trained to meet such needs, the acquisition of materials specifically designed for LEP students or similar methods." In addition, 34 C.F.R. § 200.5(a)(ii)(2) should be amended to require that LEAs review all schools receiving Title I funds to ensure that such schools are meeting their statutory and regulatory obligations.

B. Assessment

The U.S. Department of Education's Title I Office should issue guidance clarifying the legal obligation under Title I to assess LEP students "in the language and form most likely to yield accurate information on such students' knowledge and skills."

State plans require Departmental approval. The Department should make compliance with Title I's LEP assessment requirements a condition for approving state plans in the future. Moreover, the Department should require states to meet current statutory requirements for inclusion of LEP students, with accommodations and native language assessments as appropriate, in the state's proposed assessment systems. The Department also should require states to indicate the manner in which state accountability systems pay particular attention to whether LEP students are making "adequate yearly progress" and how school districts and schools will be held accountable for LEP students' academic progress.

C. Evaluation and Research[13]

The Department should ensure that its ongoing research and evaluation efforts focus on LEP students. In the area of assessment, research should continue to: develop assessments and assessment procedures that incorporate LEP students; develop guidelines for determining when LEP students are ready to take the same assessments as their English-proficient peers and when versions of the assessment other than the standard "English version" should be administered; and address whether it is possible to establish common standard benchmarks for subject matter knowledge and English proficiency within a valid theoretical framework, what these benchmarks might be, and how the benchmarks for English proficiency might be related to performance standards for English language arts. Additional research is needed to determine whether, in the context of school and district outcomes, LEP students are making progress toward meeting proficient and advanced levels of performance, and how the outcomes of nonstandard administrations/alternative assessments should be incorporated into district and statewide accountability systems and reporting requirements.

Research is also needed into how opportunities to learn can be evaluated. Although current policy does not require assessments of school and classroom conditions and resources that make it possible for students to meet new standards, it is critical to assess these opportunities to learn, especially in light of evidence that LEP students are not being provided with these opportunities.

Finally, in the context of schoolwide programs, research is needed to determine the most beneficial linguistic and cultural adaptations that will help LEP students meet their goals, and the best methods—both schoolwide and classroom—that give LEP students who are learning English access to the academic and social opportunities native English speakers have.

Endnotes

[1] Portions of this chapter are taken from Citizens' Commission on Civil Rights, *Title I in Midstream: The Fight to Improve Schools for Poor Kids* (forthcoming) and from the testimony of Dianne M. Piché, Director of the Title I Monitoring Project for the Citizens' Commission on Civil Rights, before the National Assessment Governing Board (Oct. 14, 1998). This material was gathered during the course of the Commission's ongoing investigation of federal, state, district, and school-level implementation of Title I. The portions of the chapter that discuss the inclusion of limited English proficient students in schoolwide programs have appeared in Multicultural Education Training and Advocacy, Inc., *A Report to the Office of Bilingual Education and Minority Languages Affairs, Analysis of the Participation of Limited English Proficient Students in Massachusetts Title I Programs* (Boston, MA: Multicultural Education Training and Advocacy, Inc. Oct. 1998). Other portions of the report have appeared in Diane August, Kenji Hakuta, Fernando Olguin, and Delia Pompa, *LEP Students and Title I: A Guidebook for Educators* (National Clearinghouse for Bilingual Education Nov. 1995).

[2] In this paper the authors use the term "limited English proficient" to refer to language minority students acquiring English as a second language. The term "LEP" is used because it is the term used for these students in the law. Our preferred term, however, is "English language learner."

[3] See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974).

[4] Reynaldo Macías and Candace Kelly, *Summary Report of the Survey of States' Limited English Proficient Students and Available Educational Programs and Services, 1994–95*, (Washington, D.C.: George Washington University 1996).

[5] This work was undertaken by Multicultural Education, Training, and Advocacy (META), Inc.

[6] The review was conducted by the Citizens' Commission on Civil Rights Title I Monitoring Project.

[7] To our knowledge this draft has not yet been finalized and promulgated to states and school districts.

[8] Although the U.S. Department of Education takes the position that the requirement for disaggregation does not apply to transitional assessments, the law requires that in the "transitional" period, the state devise a procedure for identifying local educational agencies (LEAs) and schools in need of school improvement and that such identification be based on accurate information about the academic progress of each LEA and school. The school improvement sections, in turn, require an annual review to determine whether LEAs and schools are making adequate progress. Adequate progress, by law, is to be defined in a manner that results in continuous and substantial yearly improvement of each LEA and school sufficient to achieve the goal of all children, particularly economically disadvantaged and LEP children, meeting the state's proficient and advanced levels of performance. Thus, the intent of the law is that during the transitional period, the state and LEAs obtain accurate information about the academic progress of LEAs and schools, and about the progress of LEP and "poor" children within these LEAs and schools. To the extent that LEP students have historically been at great risk of failing in school, separate reporting of the outcomes for these students, even in the transitional period, would most convincingly demonstrate whether there is local and school improvement and whether this improvement incorporates LEP students. Careful monitoring of differences between LEP and non-LEP students, trends in progress by subject, and socio-economic factors (rather than English proficiency status *per se*) that appear to affect performance contribute valuable information for making instructional decisions.

[9] This review was performed by the Citizens' Commission on Civil Rights Title I Monitoring Project.

[10] The information on New York and Texas state assessments is from a commissioned paper prepared by Diane August for the Committee on Appropriate Test Use, National Research Council (1998).

[11] According to Ron Streeter, Assessment Specialist in New York State, the 30th percentile is used because

in New York it has been used to identify students who need academic remediation. New York is moving to new assessments in reading and math at grades 4 and 8 that have higher standards and he is unsure whether the 30th percentile will still be appropriate as a cut score. Conversation with Ron Streeter (May 1998).

[12] This information is taken from notes provided by Milagros Lanauze on OBEMLA's research agenda for 1997–98.

[13] See Diane August and Kenji Hakuta, eds., *Improving Schooling for Language-Minority Children: A Research Agenda* (Washington, D.C.: The National Academy Press 1997).

Chapter XVI

Federal Title VI Policy and LEP Pupils

by Peter D. Roos

Introduction

It has been more than seven years since the U.S. Department of Education's Office for Civil Rights (OCR) issued its last policy update on services for limited English proficient (LEP) pupils. Since that time, a number of issues have emerged that OCR should address through policy memoranda that should be made generally available to the public. A number of advantages would accrue. First, such memoranda would assist school districts in avoiding Title VI pitfalls. Secondly, such memoranda would be of immense assistance to parents and community advocates, who monitor the thousands of school districts throughout the country for compliance with Title VI. Last, but not least, such memoranda would assist OCR in approaching these issues in a way that is consistent and uniform.

Some Title VI issues already have been addressed by internal OCR regional documents, or have received attention when they were the subject of complaints. However, clear, consistent (but flexible) national policy would elevate concern for these issues to the place they deserve, and would help OCR avoid charges of making *ad hoc* policy when it does hold districts accountable for Title VI violations.

I. Areas in Need of Policy Guidance

A. *Castañeda* and Title VI Clarification

When construing Title VI,[1] OCR has relied upon a Fifth Circuit opinion, *Castañeda v. Pickard*.[2] Quite apart from the fact that *Castañeda* interprets a separate, but parallel, law from Title VI (namely, 20 U.S.C. § 1703(f)),[3] there are holdings in this Fifth Circuit ruling that are understandable in light of the record and arguments before that court, but that are not necessarily applicable to other situations. Despite these facts which should limit the weight of *Castañeda*, subsequent courts and OCR have applied certain "holdings" widely. OCR should revisit its uncritical acceptance of two such "holdings" of the *Castañeda* court.

The first "holding" that has been transported into Title VI policy is that bilingual education is not a congressional mandate. While the Fifth Circuit's conclusion that Congress did not intend to generally mandate bilingual instruction is probably correct, the court did not have a nuanced record before it. Indeed, the court specifically observed that the issue in *Castañeda* was "not the soundness or efficacy of bilingual education as an approach to language remediation, but rather the adequacy of the actual program implemented by [the Raymondville school district] . . . ."[4] Further, the court indicated that, for the most part, it was only transfer students above grade three who were denied bilingual instruction; that these students brought with them "varying amounts of previous education in English or another language"; and that such factors and others "may be relevant to a determination of whether a school's . . . program for such students is appropriate under 1703(f)."[5]

Despite the court's own limitations on its holding, OCR has taken the broad anti-bilingual education language in *Castañeda* and applied it generally. OCR has thus permitted school districts to advance various English as a Second Language (ESL) classes as a response to the needs of all LEP students at all grade levels. For those students who have no meaningful proficiency in English, this response cuts off all access to learning any subjects other than English. Without revisiting the whole bilingual education debate, OCR should issue policy guidance indicating that there may well be limits on the use of ESL programs. Such guidance would be especially relevant in light of the broad construction of the second "holding" of the *Castañeda* case.

The second "holding" in *Castañeda* also deserves less deference than it has been accorded in the past. This "holding" is that a district need not provide curricular access to children at the same time that it is providing English language help. In other words, the court ruled that a school had two obligations: (1) a duty to overcome the language barrier by developing LEP pupils' English language skills; and (2) a duty to provide LEP students with the necessary assistance so that they could learn subjects other than English. However, the court ruled that a school could address these obligations sequentially, rather than simultaneously, through a program of intensive remediation.

This ruling must be read as a response to the argument made by the *Castañeda* plaintiffs that they were entitled to bilingual instruction for *all* LEP students at *all* times.[6] Since the only program before the court that addressed both needs was a bilingual program, and since the court was unprepared to say that bilingual instruction must be provided at all times for all children, it is clear that its ruling on simultaneity was merely an alternative ruling on the bilingual issue. It should not be construed more broadly.

In fact, there was no record before the court concerning the efficacy of remediating a curricular deficit for any given group of children after the fact. Today, there is ample evidence that the acquisition of the English language skills sufficient to learn curricula in English is a time-consuming process, taking several years, at best. The length of time needed would be even more pronounced for those students who start school with few, if any, English skills; and conversely, less pronounced for those who enter school on the cusp of full English proficiency. An OCR policy guidance that recognized these differences, and thus recognized the nuances in the *Castañeda* holding, would be both legally and educationally appropriate, and therefore of great value.

B. Other Areas

Experience with enforcement of Title VI indicates a need for OCR policy guidance in several additional areas. These include the following:

1. Evaluation of Programs

As discussed above, *Castañeda*, and by inference Title VI, impose an obligation on school districts to have a plan for evaluating students in order to ensure that children are learning both English and other subject matter. A corollary to this requirement is the obligation to respond to deficiencies identified by the evaluation. This element of a school district's obligation looms larger as the desire for prescriptiveness in programming wanes. School districts often fall woefully short in the development of valid evaluation plans. The development of model evaluation programs sculpted for different situations is greatly needed. For example, where the acquisition of curricular content is through a bilingual method, assessment should usually be through the child's first language. A different rule, such as one addressing strength of language proficiency, might apply when curricular instruction is primarily through English.

One issue, which in the past has been seen as too hot to handle, may now be ripe for consideration. Most agree that "parity of participation" should be the goal for LEP pupils, that is, LEP students should achieve proficiency in English comparable to that of average native speakers and should have equal access to subjects other than English.[7] However, there has been concern about whether parity of participation ought to be measured against the educational level of students in the child's district or whether some other standard should apply. It has been recognized that, in urban settings, the former standard often leads to proclamations of success based on a comparison group that is itself unlikely to succeed. To avoid low expectations, evaluation of LEP students' achievement should be based upon the new, high, statewide standards being developed.

2. Inclusion in All of Its Variations

Whether in the name of racial integration, improved English learning opportunities, or some other principle, schools today often discard self-contained bilingual or ESL classes. This practice poses a substantial threat that schools will return to pre-*Lau v. Nichols*[8] days. Guidance about the limits of inclusion is urgently needed. The failure to do so invites the placement of children into classrooms with untrained teachers whose proclivity will be toward serving the majority of students who speak English rather than addressing the needs of LEP students.

3. Ensuring Sufficiently Rigorous Entry and Exit Criteria

There must be sufficiently rigorous entry and exit criteria for LEP pupils. The tenor of the times is to move away from strict reliance upon objective instruments toward reliance upon subjective teacher judgment. Guidance is needed as to how such judgment should be exercised and who has the expertise to be offering a subjective opinion on this crucial issue.

II. Education Reform Initiatives and LEP Students

Several recent reform initiatives also raise questions under Title VI and have troubling implications for LEP students. These include the following:

- *Prohibition on Social Promotion, and Retention.* State after state is enacting legislation requiring that students meet a predesignated level of English reading, writing, and mathematics proficiency before passage to the next grade level. While there are multiple questions about such policies, one issue seems clear: a limited English proficient child should not be retained for failure to meet a standard of English proficiency to which one holds his native English-speaking peers. Guidance on this subject, as well as on alternative measures, would forestall much harm.

- *Assessment and Accountability.* There are a myriad of accountability schemes, some of which visit penalties and rewards on students, teachers, schools, or districts. Mechanisms that tend to reward affluent children, or hold back minority children due to language barriers or differential opportunities to learn, raise serious Title VI questions.

- *Charter Schools.* These schools have, in many instances, been created as a mechanism for attracting middle class white pupils back into the public schools. The deregulation that goes hand-in-glove with charters does not obviate the need to comply with Title VI, including services to LEP students. Guidance in this regard would be useful.

- *Equal Access to Specialized Programs such as School-to-Work, Vocational Education, Gifted and Talented, and State Compensatory Programs.* LEP pupils must have the same educational opportunities as other students, with equal access to specialized programs.

- *The Obligation of Schools of Education to Train Teachers Who Can Educate LEP Pupils.* Most institutions of higher education are subject to obligations under Title VI. While some schools and states have changed pre-service training to correspond to the needs of LEP students, many have not.

III. Conclusion

A proactive Title VI enforcement program is one that identifies key Title VI issues, seeks to forestall violations by providing guidance to school districts, and maintains clear policies which can assist in determining violations or crafting remedies. All of the above areas are ones in which further guidance from OCR could be of immense assistance in achieving Title VI's goals.

Endnotes

[1] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[2] 648 F.2d 989 (5th Cir. 1981).

[3] This section provides: "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by- . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f).

[4] *Castañeda*, 648 F.2d at 1010 n. 10.

[5] *Id.* at 1005 n. 7.

[6] See discussion, *id.* at 1011.

[7] See, e.g., *id.* at 1011.

[8] 414 U.S. 563 (1974).

Chapter XVII

Minority Access to Higher Education

By Deborah J. Wilds and Diane C. Hampton

Introduction

With the reauthorization of the 1998 Higher Education Act (HEA), ample evidence is available, at the midpoint of the Clinton Administration's second term, to assess the potential impact of the Administration's and Congress's policy initiatives on minority college access. On the one hand, the White House spent much of the past two years vocally defending the continued need for affirmative action policies and working to defeat several pieces of anti-affirmative action legislation introduced in Congress that would have severely limited the ability of colleges and universities to diversify their student bodies and faculties. On the other hand, the new student aid policies advanced by the Administration, such as education tax credits, are clearly designed to benefit middle-income families and not the families that are the most economically disadvantaged, many of whom are minorities.

Notably, however, over the past several years, many of the policies that will affect access to higher education for students of color the most were formulated and enacted at the state level. Such state policies include: banning race-sensitive measures in employment policies; eliminating bilingual programs; removing developmental (remedial) education from four-year institutions; and increasing college entrance requirements.

California's voter-approved initiative, Proposition 209, now bans the use of affirmative action policies in all state agencies and in higher education institutions. This ban, as well as its twin initiative recently passed by voters in Washington State, and the 1996 *Hopwood* decision in the Fifth Circuit, have had and will continue to have a negative impact on college access for minorities, particularly those who want to attend selective public universities.

Access to higher education for students of color also will be hampered by short-sighted policies in states like Georgia, California, South Carolina, New York, and Mississippi, where developmental education has been or is slated to be eliminated at four-year institutions. In most states, such policies are designed to force students who do not meet admissions standards at four-year institutions into two-year colleges where remedial support is offered. However, in New York State, remedial education was eliminated at public two- and four-year institutions in the City University of New York (CUNY) system, a system that enrolls large percentages of students of color. Although this policy was widely protested by student groups and education advocates, it was adopted over those objections. As a result, many students in New York must now seek remedial support through programs offered by proprietary entities.

Although state policies increasingly are shaping minority access, this paper focuses on national trends and federal policies that affect college access for students of color. The following topics are discussed: high school completion and college participation rates; college enrollments; college completion rates and degrees conferred; higher education desegregation; federal actions on affirmative action; the reauthorization of the Higher Education Act; and funding for higher education programs.

I. Statistical Trends

The American Council on Education's (ACE) Sixteenth Annual Status Report on Minorities in Higher Education reveals that students of color have experienced steady increases in college enrollments and degree awards since the mid-1980s.[1] Although the growth rates have varied widely for different racial and ethnic groups, and enrollment growth has slowed in recent years for all groups, the progress that minorities have made in higher education is good news for the future health of our nation. However, the disheartening news is that the overall percentage of blacks and Latinos enrolled in college was only slightly higher in 1996 than it was 20 years earlier.[2]

It is important to note that this paper does not include high school completion and college participation trends for Asian Americans and American Indians because the U.S. Census Bureau does not sample sufficient numbers of persons from these groups to produce reliable survey estimates when the data are disaggregated by race and ethnicity.[3] This has been an ongoing issue that has not been adequately addressed by the Census Bureau. Unfortunately, the problem will probably be made worse when the new federal racial/ethnic categories are applied.

A. High School Completion Rates

During the past 20 years (1976 to 1996), African Americans ages 18 to 24 made measurable progress in improving their high school completion rate. With gains of nearly eight percentage points, African Americans achieved their greatest gains between the mid-1970s and the late-1980s. Since then, African Americans in this age group have not made appreciable progress in raising their high school completion rate. The 1996 African American high school completion rate of 75.3% is actually 2 percentage points below the rate recorded in 1990. By comparison, the high school completion rate for whites ages 18 to 24 has remained fairly constant at 82% to 83% since the mid-1970s. As a consequence, the gap in high school completion rates for African American and white 18-to-24-year-olds, which appeared to be closing during the 1980s, has widened during the past several years.[4]

However, it should be noted that the gap between high school completion rates for African American and white 25-to-29-year-olds is smaller than that between their 18-to-24-year-old counterparts. African Americans and whites in this older age group have nearly equal high school completion rates, 85.6% and 87.5%, respectively. These figures indicate that African Americans often use adult education programs, coupled with high school equivalency examinations, to complete high school requirements.[5]

Latinos, regardless of age, are far less likely than African Americans and whites to complete high school. Nationally, only 57.5% of Latinos ages 18 to 24, and 61.1% of those ages 25 to 29, completed high school in 1996.[6]

The Latino high school completion rate has fluctuated over the past 20 years, with Latinos continuing to drop out of high school at higher rates than whites and African Americans. Thirty percent of all 16-to-24-year-old Latinos do not complete high school, compared with 12.1% of African Americans in this age group and 8.6% of white youth. Consequently, Latinos represent 13.9% of all 16-to-24-year-olds, but 34.7% of all high school dropouts. Foreign-born Latinos and those who spoke little or no English at home were at higher risk of dropping out of school.[7]

These statistics signal a need for a concerted national effort aimed at dramatically improving the high school completion rate for Latino Americans, who constitute one of the fastest growing populations in the country. Voter initiatives, such as the one in California that eliminated bilingual education, and federal policies, such as the House-approved bill to dismantle some bilingual education programs, will have the opposite effect and further limit educational opportunities for persons with limited English proficiency.[8]

B. College Participation Rates

Data from the U. S. Bureau of the Census cited in *Minorities in Higher Education: Sixteenth Annual Status Report* show that during the past two decades, the number of white youth in the traditional college-age population has declined by 15%. Yet, the percentage of white high school graduates who enrolled in college rose by more than 10 percentage points from 33% to 44% during this period. Similar data for African Americans reveal that the number of 18-to-24-year-olds increased by approximately 10%, while the number of college-age Latino youth more than doubled. Yet, because of losses in their college participation rates that occurred during the 1980s and were recouped during the 1990s, neither group experienced overall gains in the percentage of college-age youth who have gone on to college during this 20-year period. In 1996, 35% of Latino and 35.9% of African American high school graduates ages 18 to 24 were enrolled in college. The 1996 college participation rates for both groups were comparable to their college-going rates for 1976.[9]

Overall, college participation rates among high school graduates slightly increased between 1995 and 1996, reaching a new high of 43.5%. However, the college participation rates of African Americans and Latinos were unchanged. African American males ages 18 to 24 increased their college-going rate by one percentage point in 1996 to 34.4%, while the rate for African American women remained roughly the same at 35.2%. Latina high school graduates posted an increase of one percentage point in their 1996 college participation rate, compared with Latinos who lost two percentage points in their college-going rate. Consequently, the gains and losses by men and women in both groups offset each other, netting no overall change for either group.

C. College Enrollments

Despite their lower college participation rates, the actual number of students of color enrolled in college continued to inch up in 1996. However, while college enrollment among students of color increased by 3.2% in 1996, this was one of the smallest gains of the 1990s.[10]

With Hispanics and Asian Americans making greater gains than African Americans and American Indians, all four ethnic minority groups posted small enrollment increases at both two- and four-year institutions from 1995 to 1996. Latinos recorded the largest total enrollment gain, 4.7%, compared with a 3.4% increase for Asian Americans, a 2% rise for American Indians, and a 1.7% gain for African Americans. The marginal enrollment increases that minorities achieved during the mid-1990s pale in comparison to the double-digit annual enrollment gains Asian Americans and Latinos made during the 1980s and early 1990s.

Between 1995 and 1996, students of color, as a group, achieved their greatest enrollment gain at the graduate level, where enrollment rose by 5.7%. They recorded their smallest gains in professional schools, perhaps foreshadowing the declines in minority law and medical school enrollments that have resulted from the elimination of affirmative action in California and Texas in 1996.

D. College Completion Rates and Degrees Conferred

College graduation data for 1996 from the National Collegiate Athletic Association for Division I colleges and universities show that American Indians, Latinos, and African Americans continue to complete college at significantly lower rates than their Asian American and white counterparts. As of 1996, 45% of Latino, 38% of African American, and 37% of American Indian freshmen completed college within 6 years of entrance into a four-year institution, compared with 64% of Asian Americans and 59% of whites. Despite their lower college completion rates, during the 1990s, underrepresented students of color made more progress in increasing their college graduation rates than whites or Asian Americans.[11]

Women of all racial and ethnic groups completed college at higher rates than men. In 1996, 58% of all women completed college, compared with 54% of men. Although women of all racial/ethnic groups completed college at higher rates than men, the gender gap in college completion was greatest among African Americans. Approximately 42% of all African American female freshmen completed college within 6 years of entrance into a four-year institution, compared with just 33% of African American men.

As a group, students of color received more degrees in every degree category from 1994 to 1995.[12] Minority men and women experienced combined increases of 6.8% in professional degrees, 9.3% in master's degrees, 6.6% in bachelor's degrees, and 8.5% in associate degrees. Following a 74% increase during the past decade, the number of doctoral degrees earned by students of color was unchanged from 1995 to 1996. Despite the decade of growth, minorities received just 8% of all doctorates awarded in 1996.[13]

Minority women continued to make greater gains than men of color in the number of degrees they received. As a result of women's progress in degree awards, women of color now receive more undergraduate degrees than their male counterparts. However, with the exception of African Americans, men receive more graduate and professional degrees than women.[14]

During the past decade, although Asian American women and Latinas made the most dramatic gains in bachelor's degree awards (166% and 127%, respectively), it is African American women who hold the largest share of degrees compared to their male counterparts. African American women received 63.5% of all African American bachelor's degrees in 1995 and nearly 60% of all doctorates in 1996.

The progress minority students achieved in degree awards increased their total share of baccalaureate degrees from 11.7% in 1985 to 18% in 1995. Despite this hard-won gain, students of color accounted for 22% of all four-year undergraduates in 1995, which means they were still underrepresented in four-year degree awards relative to their enrollment share. This type of underrepresentation is evidenced at all degree levels.

II. Higher Education Desegregation

In Mississippi, the plaintiffs in the *Fordice* desegregation case appealed several aspects of the district court's 1995 remedial order, asserting that the court erred in approving uniform admissions standards for all eight public universities in the state. The Fifth Circuit upheld the new admissions standards, but expressed concern over implementation of summer remedial programs that were supposed to help improve African American access to public colleges and universities, noting that in implementing its new admissions standards, Mississippi had eliminated most of its previously existing developmental programs.

When the new uniform admissions standards were applied between 1995 and 1996, overall black enrollment in Mississippi's state university system increased by 7.3%.[15] However, African American first-time, full-time enrollment declined by over 460 students, or 14%. Because of this decline, in 1996, Mississippi had fewer black first-time, full-time freshmen enrolled in its public institutions than in 1976. The declining number of African American freshmen in Mississippi's public colleges and universities indicates that public college access for African Americans in the state is being negatively affected by the current court-approved admissions policy.

Twenty-five years of desegregation efforts in southern states have only yielded marginal increases in African American access to traditionally white public four-year institutions.[16] A recently released study from the Southern Education Foundation (SEF), *Miles to Go*, found that, in the 19 states that were mandated to desegregate their colleges and universities as a result of the U.S. Supreme Court's ruling in the 1972 *Adams* decision, only 12.1% of the African Americans entering public institutions enrolled in traditionally white schools.[17] The report also found that African Americans only accounted for 8.6% of all freshmen attending state flagship universities in the South. The vast majority of African Americans in these 19 states attend Historically Black Colleges and Universities and community colleges.

The SEF study found that efforts to improve African American access at public flagship institutions in the South were hampered by a range of interwoven factors. In some states, officials lack genuine commitment to racial parity, and consequently only do as much as needed to avert federal enforcement actions. More recently, the decisions in the *Fordice* and *Hopwood* cases, which came to differing conclusions with respect to the use of race in college admissions and the award of financial aid, have created new concerns and excuses about the use of race-conscious remedies in states covered by the Fifth Circuit.

The SEF report also suggests that higher admissions standards at flagship institutions and inadequate academic preparation in K-12 schools make many public flagship universities inaccessible to many African Americans. Additionally, state-funded need-based financial aid is limited in most southern states because a high percentage of state funds are used for merit-based financial aid programs. The 19 southern states identified in the report distribute 10 times the percentage of financial aid on a non-need basis than do the 31 non-southern states. These kinds of financial aid policies have a differential effect on African Americans, who are much more likely to be poor than are whites. In 12 of the 19 states identified in this study, approximately 30% of all African American families had incomes under $10,000. African Americans are also less likely to qualify for merit-based aid because the criteria that are used to make awards have been closely linked to high achievement on standardized tests, which immediately eliminates many African American students because of their low test scores.

III. Federal Actions on Affirmative Action

At the national level, there have not been any legislative proposals that support, improve, or strengthen affirmative action. All of the efforts have been to curtail or eliminate affirmative action altogether. The most potentially devastating proposal in the 105th Congress was introduced by Representative Charles Canady (R-FL) and Senator Mitch McConnell (R-KY). This proposal would have eliminated the consideration of race, ethnicity, or gender in all employment, contracting, and other programs at the federal level. Although the legislation purported to encourage the recruitment of qualified women and minorities, it specifically prohibited the use of any numerical objectives such as goals and timetables. It also would have eliminated the use of affirmative action to remedy past or present discrimination, prohibited consent decrees that utilize race-specific measures, and outlawed even those programs that meet the "strict scrutiny" standard set by the Supreme Court.

Experts disagreed as to the impact it would have had on colleges and universities. Most policy analysts concluded that the federal student financial aid and other federal grants virtually every college and university receives could be broadly interpreted as contracts, and therefore subject to the limits of the legislation. Other analysts contended that, if such a proposal were narrowly focused, the impact on higher education would be minimal.

There were several hearings held on the measure, but most focused on employment and the awarding of federal contracts, with very little attention given to the use of affirmative action in college admissions. The Clinton Administration opposed the Canady/McConnell legislation. Justice Department officials testified at several of the hearings, defending their record on civil rights investigations and their involvement in trying to defeat Proposition 209 in California.

The House Judiciary Subcommittee on the Constitution approved the bill along party lines. At the full Judiciary Committee level, a group of moderate Republicans moved to table the legislation, stating that "this bill will not speed up the correction of the current injustices nor will it narrow the racial divide," and that "forcing this issue at this time could jeopardize the daily progress being made in ensuring equality." This action effectively killed the bill, at least for the duration of the 105th Congress.

A more direct attack on affirmative action in higher education was launched by Representative Frank Riggs (R-CA) during floor debate on the Higher Education Act Amendments of 1998, who introduced an amendment to eliminate the use of race, ethnicity, or gender in assessing candidates for admission to any institution of higher education that receives federal aid. After several revisions in an attempt by Representative Riggs to garner more support among his colleagues in the House, the version that was ultimately considered on the House floor was limited to public institutions only. The higher education community and the Clinton Administration were united and highly visible in opposition to this measure. The Departments of Justice and Education sent several joint letters to Congress, in which Attorney General Reno and Secretary Riley unequivocally stated their opposition to the Riggs Amendment. Attorney General Reno and Secretary Riley also informed Congress that they would advise President Clinton to veto the final bill if it included the Riggs Amendment. In the end, the Amendment was overwhelmingly defeated.

A development likely to have a negative impact on many qualified and talented women and minorities involves the National Science Foundation (NSF) fellowship program for women and minorities underrepresented in graduate programs in the sciences. Following the filing of a lawsuit alleging "reverse discrimination," the NSF revised its fellowship program and adopted race-neutral criteria for eligibility.

IV. Reauthorization of the Higher Education Act (HEA)[18]

Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP), a new initiative contained in the HEA, is designed to provide a range of early intervention and college awareness services for eligible low-income students. The initiative calls for the creation of partnerships made up of a degree-granting institution of higher education, a middle school that has at least 50% of its students eligible for free or reduced-price lunches, the high schools where these students will ultimately enroll, and at least two community-based organizations. GEAR UP is a hybrid of High Hopes, which was the Clinton Administration proposal introduced in the House, and Connections, which was the Senate alternative. The Administration is moving quickly to implement GEAR UP. It is too early to assess the impact of this program, but it is estimated that GEAR UP will enhance opportunities for students of color. It is anticipated that the program will give many low-income minority youth the tools needed to better prepare them for college, improve retention, and ensure success.

The highly successful TRIO programs—which identify talented low-income and disadvantaged students, and motivate and prepare them for college—were modified slightly in HEA. The reauthorization expanded TRIO programs and increased the stipend for participants in Upward Bound and McNair. The five TRIO programs, which provide a bridge from secondary to postsecondary education, are: Talent Search, which identifies and mentors promising students; Upward Bound, which helps students prepare for college; Educational Opportunity Centers, which provide information on academic and financial aid opportunities; Student Support Services, which provide tutoring and other support services for students once enrolled in college; and the Ronald E. McNair Postbaccalaureate Achievement Program, which provides research opportunities and mentoring for promising doctoral students planning to teach at the college level. Approximately 60% of current participants in the TRIO early intervention programs are students of color, making it one of the most important and effective federally funded access programs in higher education for minority students.

HEA Title III (Institutional Aid) assists institutions that serve large populations of minority and disadvantaged students in strengthening their academic programs and financial stability. Title III grant funds may be used for faculty development, improvement of institutional management, equipment acquisition, increased use of technology, and student support services. Institutions will be permitted to use up to 20% of their grant funds for establishing and/or improving their endowment funds, and are required to provide a non-federal match. A new two-year wait-out period between grants has been added to enable more institutions to compete for scarce resources.

HEA expands grants for graduate and professional programs at Historically Black Colleges and Universities (HBCUs) to include two new institutions, Norfolk State and Tennessee State Universities. In addition, HEA gives institutions more flexibility in determining which graduate programs are qualified. HBCUs will be required to provide a non-federal match for any amount over $1 million (raised from the current $500,000).

New sections of HEA provide assistance to American Indian Tribally Controlled Colleges and Universities and Alaska Native and Native Hawaiian-Serving Institutions. Each of these provisions has a separate authorization.

The program of grants to Hispanic-Serving Institutions (HSIs) has been moved to a separate title, but the purposes and endowment requirements remain the same as for Title III grants. To qualify as an HSI, the institution must serve an enrollment that is at least 25% Hispanic, of which 50% must be from low-income families. Proper uses of funds include construction or maintenance of instructional facilities, faculty exchanges and faculty development initiatives, the purchase of books and periodicals, technological and management improvements, and expanding graduate and professional opportunities for Hispanic students. The Administration supported a separate authority for HSIs and for Tribal colleges.

HEA also reorganizes graduate education programs. The Jacob K. Javits Fellowship Program for competitive grants for graduate study in the arts, humanities, and social sciences was reauthorized. The Graduate Assistance in Areas of National Need (GAANN) program was reauthorized for graduate academic departments and programs; a 25% match of non-federal funds is required. The award of Javits and GAANN grants will be based on financial need and merit, which will increase access to graduate programs for talented minority students. The Administration had recommended consolidation of four graduate programs into one, a matter of great concern to the higher education community.

HEA also creates the Thurgood Marshall Legal Educational Opportunity Program for low-income, minority, or disadvantaged students seeking a law school education. This new program is designed to provide information, preparation, and financial assistance to students to assist them in gaining access to and completing law school.

The higher education community and the Clinton Administration differed in their approaches to improving programs that prepare our nation's teachers. The community proposed a program of competitive grants to states and institutions to address this issue. By contrast, the Administration recommended that outstanding teacher preparation programs be identified and awarded grants to share exemplary practices with institutions that sought to improve their programs.

The higher education community and the Administration did agree, however, that the program of Minority Teacher Recruitment should be strengthened and expanded. In the final bill, however, all references to "minority" candidates were removed. Instead, recruitment measures will be focused on "high-need" communities. There will be three separate grant programs: 45% of the total amount will be allocated for State Grants to improve the accountability of teacher preparation programs and reform teacher certification requirements; 45% for Partnership Grants to institutions of higher education and high-need local education agencies to improve accountability of teacher preparation programs and provide clinical experience and ongoing professional development for new and experienced teachers; and 10% for Recruitment Grants specifically focusing on the recruitment of highly qualified teachers, especially for high-need schools.

HEA holds institutions of higher education accountable for disseminating information on the quality of their teacher preparation programs. In a development that will likely have a disproportionate impact on students of color, the availability of student financial aid will be linked to the pass rate of their graduates on teacher assessments; if a teacher preparation program is found to be low-performing, its enrollees will not be eligible for federal financial aid.

On the other hand, a new loan forgiveness program was created for student borrowers who choose to teach in urban and rural school districts serving large populations of low-income children. To be eligible for loan forgiveness, secondary teachers must have a degree in the subject matter they are teaching. It is expected that many students of color will take advantage of this opportunity to discharge some or all of their loan indebtedness.

HEA created a new program of grants to institutions of higher education to establish or expand campus-based child care services for low-income students with children. The legislation includes before- and after-school care and encourages progress toward accreditation of child care facilities. The intent of this provision is to improve access to college, especially for single parents, many of whom are students of color.

V. Funding for Higher Education Programs

Education continues to be a high priority for both the White House and Congress. Higher education has benefitted from this commitment with overall boosts in funding for the past two years. After years of freezes and cutbacks, the funding increases achieved in FY1998 and FY1999 are a critically needed step in the right direction. These increases in funding for student aid will have a beneficial impact on students of color, many of whom are also low-income.

The federal government provides 75% of all student financial aid, and nearly 4 million postsecondary students receive Pell Grants, the cornerstone of the financial aid package. The average family income for Pell recipients is near the poverty level. In FY1998, the Clinton Administration recommended—and Congress appropriated—a $300 increase in the maximum Pell Grant to $3,000, the second year in a row that such a large increase was enacted, after nearly a decade of level funding. In FY1999, the Administration requested only a $100 increase in the maximum award. However, in the omnibus appropriations bill, Congress allocated an additional $25, bringing the maximum grant to $3,125.

For two consecutive years, the Administration recommended a significant increase in the federal Work-Study program to enable institutions to place more students in tutoring and other literacy positions in connection with the *America Reads* initiative, which was a Clinton Administration priority. The flip-side of this budget request was that other student aid programs were slated for cuts, namely the low-interest Perkins loan program and the state matching grant program (SSIG), which leverages nearly nine times the federal investment in actual aid awarded to students. In fact, the Administration recommended that SSIG funding be terminated. It is estimated that nearly 40 states would either reduce or discontinue the state grant program if federal funding were eliminated. Congress has continued appropriations for both Perkins and SSIG, though at significantly less than the FY1997 level.

The TRIO programs have strong support in both the Administration and Congress. Increases have been proposed and funded for the past two years, bringing the total funding to $600 million this year. The newly authorized GEAR UP program was funded in FY1999 at $120 million, compared to the $140 million that the Administration had requested.

After proposing a two-year phase-out of institutional aid in FY1997, the White House renewed its commitment to this vital program. Congress followed by increasing its allocation for strengthening institutions, HBCUs, and HSIs. They also appropriated $3 million each for the new programs for Tribal Colleges and Alaska Native and Native Hawaiian-Serving Institutions.

The centerpiece of Clinton's 1996 reelection campaign was the creation of a $42 billion package of education tax credits. The intent was to expand opportunities for middle-income—rather than low-income and working class—families and make two years of college available to all. Both the Hope Scholarships and Lifetime tax credits are non-refundable, so only those families with tax liability would benefit. Treasury officials—specifically, the Internal Revenue Service—met with the higher education community in regional briefings to address concerns and answer questions concerning implementation and reporting requirements for these new programs. Many of those concerns were reflected in the final published regulations.

VI. Conclusions and Recommendations

The growth students of color experienced in college enrollments and degree awards during the past decade is clear evidence that progress has been made. Much of the gain can be attributed to effective race-sensitive admissions policies, minority scholarship and fellowship programs, and increased minority retention efforts, all of which are facing curtailment on some campuses. If widespread, such changes will severely cripple minority access and resegregate public higher education. Given the racial and ethnic transformation the nation is undergoing, policies that limit minority college access fly in the face of reality and are not in this country's best interest.

It remains abundantly clear that affirmative action programs will continue to be the focus of attacks in the Republican-controlled 106th Congress. Therefore, the Clinton Administration must again position itself to work with the higher education community to aggressively defend affirmative action programs. Beyond assuming a strong defensive posture with Congress on this issue, the Administration should look for opportunities to partner with higher education and business leaders to educate the electorate about the continuing need for race-sensitive employment and college admissions measures. The country as a whole will benefit from such efforts.

As desegregation efforts drag on in some southern states, both the Department of Justice and the U.S. Department of Education's Office of Civil Rights have vital roles to play in monitoring and ensuring that states continue to take system-wide steps to desegregate their systems of higher education. Given the current desegregation plan in Mississippi and the direction of the enrollment numbers for college freshmen, African Americans in the state could end up having less access to public state institutions than before the plan went into effect. Close federal monitoring of this situation continues to be needed.

Finally, the Administration must move quickly to implement the GEAR UP program and aggressively recruit school districts with high percentages of students of color to participate. Close monitoring of the impact of GEAR UP and other programs designed to increase college-going rates of underrepresented minorities is essential.

Endnotes

[1] Deborah J. Wilds and Reginald Wilson, *Minorities in Higher Education: Sixteenth Annual Status Report, 1997–98*, at 19 (Washington, D.C.: American Council on Education 1998).

[2] *Id.* at 14.

[3] U.S. Department of Commerce, Bureau of the Census, *School Enrollment–Social and Economic Characteristics of Students: October 1996* (Current Population Reports, P–20 Series 1997). [On-line document].

[4] Wilds and Wilson, *supra* note 1, at 9.

[5] *Id.* at 16.

[6] *Id.* at 17.

[7] *Id.* at 12.

[8] Charles Dervarics, "House Approves Plan to Limit Bilingual Education," *Black Issues in Higher Education*, at 3 (Oct. 1, 1998).

[9] Wilds and Wilson, *supra* note 1, at 13.

[10] *Id.* at 19.

[11] *Id.* at 25.

[12] *Id.* at 29.

[13] *Id.* at 100.

[14] *Id.* at 29–33.

[15] Southern Education Foundation, *Miles to Go: A Report on Black Students and Postsecondary Education in the South*, at 45 (Atlanta, GA: Southern Education Foundation 1998).

[16] Jamilah Evelyn, "The Long, Winding, and Neglected Road," *Black Issues in Higher Education*, at 19 (Sep. 17, 1998).

[17] Southern Education Foundation, *supra* note 15, at 17.

[18] Public Law No. 105-244 (Oct. 7, 1998) (H.R. 6, 105th Congress).

Chapter XVIII

The Continuing Challenge: Gender Equity in Education and the Clinton Administration

by Verna L. Williams, Leslie T. Annexstein, and Neena Chaudhry

Introduction

> *Title IX has broken down barriers and expanded opportunities—opening classroom doors, playing fields, and even the frontiers of space to women and girls across this country. . . Yet more needs to be done. Our nation can reach its full potential only when all of our citizens have the opportunity to reach their full potential and contribute to our society.*[1]

Commemorating the 25th anniversary of the enactment of Title IX of the Education Amendments of 1972, President Clinton captured not only the nation's status in achieving Title IX's goal of gender equity in education, but also this Administration's efforts to enforce the statute's mandate: important strides have been made, but much more work remains. Despite the increased numbers of women entering colleges and universities, playing fields, and other areas previously closed to them, sex discrimination remains a constant in education: sexual and gender-based harassment is too common throughout educational institutions; disparities in standardized testing continue to keep opportunities out of reach for many girls and women; and female students remain underrepresented in math, science, and technology, fields of the future that can lead to economic well-being.

As the Administration enters the second half of its second term and pursues its agenda of reforming the nation's education system, gender equity must be in the forefront of this initiative. Indeed, efforts to ensure that all students can learn and are held to high standards will not succeed without addressing the persistent barriers that girls and women continually face in elementary, secondary, and postsecondary institutions. This chapter examines the Clinton Administration's attempts to address sex discrimination in education and makes recommendations to strengthen those efforts for the remainder of this term.

I. Department of Justice

The Administration marked the 25th anniversary of Title IX of the Education Amendments of 1972 by rededicating the executive branch agencies to enforcing the statute's mandate against sex discrimination and charging the Department of Justice with carrying out this new effort. The President issued two important directives: one requires federal agencies to develop Title IX enforcement plans, including regulations and procedures for handling Title IX complaints; the other requires them to prepare for a proposed executive order applying Title IX and Title VI of the Civil Rights Act of 1964 to programs conducted by the federal government, as section 504 of the Rehabilitation Act does currently. The Department of Justice was given the task of coordinating implementation of the directives, which was to be completed no later than the summer of 1997. At this writing, however, well over one year later, this job still remains incomplete, with troubling implications for Title IX enforcement.

These directives finally would bring the federal government into compliance with Title IX and therefore are critical to achieving gender equity in education. Specifically, Title IX authorizes every federal agency that funds education programs or activities to enforce the statute and requires them to promulgate regulations to enforce the law. Yet, only four federal agencies have implementing regulations: the Departments of Education, Health and Human Services, Agriculture, and Energy. As a result, most of the responsibility for enforcement lies with the Department of Education's Office for Civil Rights (OCR), with its limited resources.

Because of the President's directives, OCR's efforts will receive much needed assistance. When the agencies develop regulations and enforcement plans, they, too, will be able to conduct compliance reviews and address inequities in critical areas such as access to math, science, and technology, fields in which female students are underrepresented. However, because the Department of Justice has yet to issue the already overdue regulations, the federal government continues to be out of compliance with Title IX, and resources needed to supplement OCR's efforts continue to be out of reach. The Department should issue the regulations and enforcement plans without any further delay in order to bring the government into compliance with the law and enhance enforcement of Title IX.

In addition, the Department should take the necessary steps for issuance of the proposed executive order applying Title IX and Title VI to programs conducted by the federal government. The proposed order would ensure that the goals of both laws would be realized and would send the message that these laws apply equally to the federal government. The programs affected include many federally administered scholarships and fellowships that provide important educational opportunities for students, such as the scholarships administered by the National Science Foundation. Thus, victims of discrimination would have an important remedy that previously was unavailable. In addition, the federal government would be held accountable for complying with the nation's anti-discrimination laws. The Department was to report back to the President with information explaining the likely impact on executive branch agencies of the proposed executive order no later than the end of August 1997. However, at this writing, this directive still has not been finalized either. We urge the Department to complete its work on both orders without further delay.

We also urge the Department of Justice to take strong, proactive steps to ensure that the executive branch agencies carry out their new responsibilities with vigor. The Department should provide training, where necessary, as well as litigation support. We also reiterate our recommendations from previous years that the Department take proactive measures to enhance Title IX enforcement. Specifically, we renew our recommendation that the Department take an expanded role in Title IX enforcement by developing a litigation plan and working collaboratively with OCR.

II. Office for Civil Rights

A. Resource Allocation

As the Administration approaches the end of its second term, the Office for Civil Rights has received a much needed increase in the resources necessary to accomplish its mission, which should enable it to dedicate more efforts to Title IX enforcement.

Congress funded OCR in the amount of $61.5 million for FY1998, which has allowed the agency to hire up to its ceiling of 724 full-time equivalent positions (FTE). This figure represents a 12% increase in funding from the previous fiscal year, when OCR was only able to hire 681 FTE, the lowest number in the decade. For fiscal year 1999, Congress did not fulfill the President's funding request for the agency; however, it appropriated $66 million for OCR, representing a significant increase, nonetheless.

The increased appropriation is timely, since complaints to OCR appear to be on the rise as well. During FY1997, complaints filed with OCR increased almost 10%, to 5,296. Of that number, 700—or about

8% of all complaints—alleged violations of Title IX, representing an increase of almost 17% (which OCR attributes, in part, to the public awareness generated by the 25th anniversary of Title IX). OCR initiated only 2 compliance reviews focusing on sex discrimination in FY1997, out of a total 152 such reviews—down from 4 compliance reviews begun in 1996.

Clearly, OCR needs to place greater emphasis on addressing sex discrimination in education. As the figures suggest, most of OCR's efforts focus on reacting to complaints filed with the agency; in some cases, other external occurrences spur it to action. Currently, Title IX complaints and compliance reviews form just a small part of OCR's work. OCR should craft a strategic approach to Title IX enforcement, making more use of its authority to conduct compliance reviews. Strong proactive measures are necessary to have an impact on the serious and persistent sex discrimination—ranging from sexually hostile environments in classrooms and gender-based harassment in career education programs to inequities resulting from standardized testing—that is ongoing throughout educational institutions. In addition, such efforts are necessary to make clear to educational institutions across the board that OCR takes violations of Title IX seriously. Once the Department of Justice issues the regulations necessary to enable other federal agencies to enforce Title IX, OCR also should take steps to work collaboratively with those agencies to identify and address sex discrimination in education.

B. Sexual Harassment

In March 1997, after a process exceeding three years, OCR issued its final comprehensive policy guidance on sexual harassment of students. As we recommended in the Citizens' Commission's last report, OCR combined its policies on student-to-student harassment and teacher-to-student harassment in one document setting forth educational institutions' obligations under the law. The policy makes clear that institutions must address and remedy sexual harassment of students, regardless of whether the harasser is a teacher, another student, or not an employee of the school district.

In September 1998, OCR issued an important clarification of its policy in light of the Court's decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). Under *Gebser*, school districts may be held liable in damages for teacher-to-student sexual harassment only if school officials had notice of the specific misconduct and responded to it with deliberate indifference. The *Gebser* decision places a heavy burden on victims in the Title IX context that effectively denies them important protections from sexual harassment that are available, in contrast, to adult employees in the workplace. OCR sent a letter to superintendents of schools making clear that *Gebser* did not affect the validity of OCR's sexual harassment policies; accordingly, schools still could be in violation of the statute if they failed to address and remedy sexual harassment of students—even if they might not be liable for damages under the new standard the Court articulated. OCR has indicated its intention to issue a similar letter to presidents of the nation's colleges and universities. Such guidance is essential to ensure that institutions do not misinterpret *Gebser* as freeing them from the duty to address this form of sex discrimination. Additionally, OCR should review the Supreme Court's recent decisions in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998), which articulate the standard of institutional liability for supervisors who abuse their authority to sexually harass workers, to determine their application to the policy. Finally, OCR should use this opportunity to reiterate the means by which institutions can prevent sexual harassment, such as through strong and meaningful policies and procedures.

C. Athletics

Many of the complaints OCR received during the past two years concerned discrimination in athletics. In the elementary and secondary school context, OCR received 83 athletics-related complaints in 1997, the highest number received in a single year since the agency began to collect data.[2] In the higher education context, the National Women's Law Center (the "Center") called on OCR to respond to 25 complaints alleging sex discrimination in the allocation of athletic scholarships by colleges and universities.

Pursuant to OCR's 1979 Policy Interpretation of its regulations, Title IX requires the total amount of athletic scholarship aid made available to men and women to be substantially proportionate to their respective athletic participation rates. Thus, for example, if 40% of a school's athletes are women, then female athletes must receive close to that percentage of the total athletic financial assistance. Relying on information provided by colleges and universities under the Equity in Athletics Disclosure Act, the Center identified 25 institutions that were in apparent violation of these requirements. Based on the most recent data available at the time, the Center revealed the existence of a $5 million "scholarship gap" representing the scholarship dollars women lost in the 1995–96 school year due to schools' failure to equitably distribute this aid. In June 1997, citing the enormous educational and economic consequences of this scholarship gap, the Center called on OCR to end this discrimination.

In the course of investigating the 25 complaints, OCR clarified the Title IX obligations of educational institutions in the area of athletic scholarship opportunities. In a July 23, 1998, letter circulated to schools, including the schools cited in the Center's complaints, OCR clarified the Title IX compliance standard for athletic scholarships described above. The July 1998 clarification provides that a school's scholarship aid for athletes of either gender must be within 1% or one scholarship (whichever is greater) of that gender's athletic participation rate at the school, unless there are legitimate, nondiscriminatory reasons to explain a larger disparity. Under the clarification, therefore, if 40% of a school's athletes are women, then 39% to 41% of the total budget for athletic scholarships must be allocated to women, absent limited nondiscriminatory factors that could justify a greater disparity. While OCR strongly encouraged schools to comply with this standard for the 1997–98 academic year, the standard officially took effect beginning in the 1998–99 academic year.

At this writing, OCR has issued letters of finding on about half of the schools cited in the Center's complaints. Some schools have entered into agreements to achieve Title IX compliance by the 1998–99 academic year or earlier, while others have been found in compliance either because legitimate, nondiscriminatory factors explained the disparity or because no disparity was found based on revised data.

We urge OCR to enforce this new policy clarification proactively, through compliance reviews, in order to ensure that the important financial assistance that athletic scholarships provide is just as available to female athletes as to their male counterparts.

III. Legislative Developments

A. Higher Education Amendments of 1998

President Clinton signed the Higher Education Amendments of 1998 (HEA) into law on October 7, 1998, and in so doing authorized major federal programs supporting postsecondary education, such as student financial aid, institutional aid, graduate programs, and teacher preparation. HEA contains a number of provisions that specifically address access to higher education and safety for women on college campuses, including:

- Increases in Pell grant awards and dependent care allowances;[3]
- Campus-based child care;[4]
- Athletics disclosure requirements;[5]
- An education-welfare study to determine the effectiveness of educational and rapid employment approaches to helping welfare recipients and other low-income adults become employed and economically self-sufficient;[6]
- Campus crime disclosure requirements;[7]

- Grants to combat violent crimes against women on campuses;[8] and
- A study of the procedures taken by institutions of higher education after receiving reports of sexual assault.[9]

The following focuses on the disclosure requirements for athletics and campus crime because they present new opportunities for the Administration to address gender equity in higher education.

1. Athletics Disclosure Requirements

The athletics disclosure requirements (the Fair Play Act) were originally introduced by Senator Carol Moseley-Braun (D-IL), Representative Nita Lowey (D-NY), and others, with strong support from women's organizations. These provisions make information on equity in athletics at colleges and universities available to the public from one central place: the U.S. Department of Education. While schools already were required to compile information regarding expenses and revenues for male and female sports and make that information available to the public upon request, students, parents, or other interested parties typically had to make numerous requests to various departments within institutions simply to find an official familiar with the law's requirements. Consolidating this data at the Department of Education will enable students to compare how schools allocate their athletics resources and thus allow young women to make informed choices about which colleges and universities offer them the best opportunities to develop fully both their academic and athletic talents. The Secretary of Education will notify all high schools of the availability of these reports and how they may be obtained, and will prepare a report to submit to Congress by April 1, 2000. Importantly, because the provisions are aimed at eliminating the obstacles encountered by students and others in determining a school's compliance with Title IX, OCR should make use of this data in its enforcement efforts to require institutions to address and remedy disparities in opportunities available to female athletes.

2. Campus Crime Disclosure Requirements

These provisions require institutions of higher education to compile data on sex offenses, as well as on other crimes such as murder, robbery, and aggravated assault. In addition, colleges and universities must collect data regarding any crime involving bodily injury in which the victim was targeted because of gender, actual or perceived race, religion, sexual orientation, ethnicity, or disability.[10] Institutions must submit these statistics to the U.S. Department of Education on an annual basis and make copies of the data available to the public. In compiling the data in this manner, higher educational institutions can begin to evaluate forms of prejudice and discrimination that manifest themselves in violent ways and take appropriate steps to remedy that discrimination. In addition, the Department can review the data and refer to OCR any information regarding a pattern of violence against women that, for example, suggests that the institution's response to the underlying misconduct is inappropriate. Ultimately, this process of identification and remediation can only improve the educational benefits and opportunities for all students.

A related provision authorizes the Attorney General to make grants to institutions of higher education to reduce the incidence and improve the response to violent crimes against women.[11] The program is authorized at $10 million for FY1999 and for such sums as may be necessary for FY2000–03.[12] Additionally, the Attorney General, in consultation with the Secretary of Education, will commission a national baseline study to examine procedures undertaken by an institution of higher education after receiving a report of sexual assault. The study is authorized at $1 million and a report will be submitted to Congress by September 1, 2000.[13]

These provisions in HEA have the potential to begin to improve the educational response to violence, including sexual assault, against women on campuses, which, in turn, will enhance women's ability to benefit from the educational experience and to take full advantage of educational opportunities.

B. Carl D. Perkins Vocational and Applied Technology Education Amendments of 1998

1. Overview

On October 31, 1998, the President signed into law the Carl D. Perkins Vocational and Applied Technology Education Amendments of 1998 (the "Perkins Act").[14] The law, which goes into effect on July 1, 1999, reauthorizes the U.S. Department of Education's vocational and technical education programs through 2003.[15] This law aims to improve vocational and technical education by strengthening academics; integrating academic, vocational, and technical instruction; increasing state and local flexibility in providing services and activities; and disseminating national research and providing professional development that will improve vocational and technical education programs, services, and activities.[16] Previously, the law also contained an emphasis on promoting gender equity and assuring women access to nontraditional programs. However, as reauthorized, that focus has been greatly diminished. Still, the resulting law contains a few provisions that will enable the Department of Education to ensure that states do not abandon long-standing efforts to address this issue.

Before reauthorization, the vocational educational law included two very strong provisions focusing on gender equity: (1) a requirement that states set aside 10.5% of their monies for programs that serve displaced homemakers, single parents, single pregnant women, and programs that promote gender equity; and (2) a requirement that $60,000 be earmarked for a sex equity coordinator in every state, as well as for specifically mandated activities. These two important provisions represented the federal commitment to ending the tracking of girls and women into programs leading to low-wage, traditionally female jobs with few opportunities for advancement. Moreover, they provided real opportunities for women to make a living wage. In Florida, for example:

> *81 percent of participants earned incomes of less than $10,000 per year at the time of entry into a displaced homemaker/single parent program. After completing the program, the state found that 71 percent participants were employed in Florida, earning an average income of $20,676 per year—doubling their incomes at the time of enrollment.*[17]

Despite the significance of these provisions and their proven success for women in programs across the nation, addressing gender equity in vocational education was a highly controversial issue during Congress's reauthorization of the vocational education law. Many lawmakers were determined to eliminate set-asides for gender equity activities. And some in Congress came to view the very term "gender equity" (or "sex equity") as completely unacceptable. Representatives Mink (D-HI) and Morella (R-MD) attempted to preserve sex equity set-asides by introducing an amendment to the House bill, but it was narrowly defeated by a margin of seven votes. The House was even unable to reach a bipartisan agreement that would have included in the law a hold harmless provision for sex equity reserves. In the end, the House passed a bill that only included programs for women and girls among a long laundry list of permissible activities.

On the Senate side, Republicans on the Labor and Human Resources Committee crafted a compromise that eliminated sex equity set-asides but required states and local districts to provide programs and services for displaced homemakers, single parents, and gender equity and required states to spend $60,000 on state technical assistance activities related to gender equity.

Ultimately, in this atmosphere hostile to gender equity, the two strong gender equity provisions that had existed previously could not be sustained. However, members of the National Coalition for Women and Girls in Education[18] were able to help secure other provisions that address the special needs of women who are preparing for nontraditional training and employment, single parents, single pregnant women, displaced homemakers, and individuals from economically disadvantaged families. The following is a summary and analysis of the provisions of the vocational education act that can promote gender equity.

2. Definitions

Not surprisingly, the term "gender equity" or "sex equity" is absent from the 1998 Act. Instead, the Act includes definitions for the terms "displaced homemaker"; "nontraditional training and employment"; and "special populations." The definition of "displaced homemaker" has changed only minimally. "Nontraditional training and employment" means occupations or fields of work, including careers in computer science, technology, and other emerging high skill occupations, for which individuals of one gender comprise less than 25% of those employed in such occupations.[19] This definition recognizes the significance of new occupations, particularly in the areas of science, technology, and computers, in our society. Previously, "special populations" was defined to include "individuals who participate in programs to eliminate sex bias." The term "special populations" now includes individuals preparing for nontraditional training and employment and single parents, including single pregnant women, and displaced homemakers.[20] Because the law requires states to serve these populations, the specific definitions provide a handle for holding states accountable for fulfilling these requirements. In order to make these provisions most effective, however, any data collection conducted under the reauthorized Perkins Act should disaggregate the six categories of special populations to provide a full view of how each group is actually being served—or not being served.

3. State Allocation of Federal Funds

Under the Perkins Act, states must distribute at least 85% of the monies allocated by the federal government for vocational education to local educational agencies and eligible institutions or consortia of eligible institutions.[21] States may reserve up to 10% of their grant for "State Leadership" activities, of which "not less than $60,000, but no more than $150,000 would be made available for nontraditional training and employment."[22] Additionally, states may use up to 10% of their funds for vocational education grants for activities in a variety of areas, including "communities negatively impacted by changes resulting from the amendments made by the Carl D. Perkins Vocational and Applied Technology Education Amendments of 1998 to the within State allocation."[23] Under the terms of this provision, states could use some of this money to promote gender equity activities, since the Perkins reauthorization without question "negatively impacted" women, whose special needs had been addressed by the gender equity provisions that ultimately were eliminated. Accordingly, the Department of Education's Office of Vocational and Adult Education (OVAE) should issue guidance alerting states that gender equity activities may be financed under this provision.

4. Accountability

The Perkins Act also establishes a state performance accountability system. The system consists of four core performance indicators, one of which requires states to measure and report on "student participation in and completion of vocational and technical education programs that lead to nontraditional training and employment."[24] States also must describe the progress of special populations participating in such programs in meeting state-adjusted levels of performance.[25] OVAE focused on the establishment of performance measures during this reauthorization so as to provide the Department of Education with a handle for truly assessing and monitoring the implementation of vocational education programs. OVAE has taken the position that because "nontraditional employment and training" has been included as a core indicator, gender equity activities necessarily will have to be maintained at the state and local levels. As a result, OVAE can refer to OCR for enforcement clear disparities in addressing the needs of female students, based on these core indicators.

5. State Administration and State Plan

The Perkins Act requires states to submit a five-year plan to the Secretary of Education and to evaluate their programs, services, and activities, including preparation for nontraditional training and employment.[26] The state plan must include information describing how individuals who are members of special populations will be afforded equal access to activities, will not be discriminated against, and will be provided with programs to enable them to meet or exceed state-adjusted levels of performance and prepare them for additional education and for high-skill, high-wage careers.[27] Additionally, the state plan must describe how funds will be used to promote preparation for nontraditional training and employment.[28] Under the terms of the Act, federal funds will not be distributed unless these conditions, among others, are met. The Department of Education should review state plans carefully to ensure compliance with these requirements.

OVAE intends to develop and provide guidance regarding implementation of the 1998 amendments.[29] It is not yet clear when OVAE will provide this guidance or what form the guidance will take. However, it will be important for OVAE to send the strongest message possible—as quickly as possible—that state programs must continue to address gender equity issues.

IV. A Challenge for the Remainder of the Clinton Administration

As mentioned above, during its 1997 term, the Supreme Court decided *Gebser v. Lago Vista Independent School District*, which severely limits the availability of damages for sexual harassment under Title IX. While this decision undoubtedly is a setback for enforcement of Title IX, it presents the Administration with an opportunity to take the lead in working with Congress to craft a legislative remedy to restore the full range of remedies under the statute.

By a 5 to 4 vote, the Court ruled in *Gebser* that schools may be held financially responsible for teacher-to-student sexual harassment only when top officials know about the misconduct *and* respond to it with "deliberate indifference." In contrast, under two Title VII cases also decided that term, *Faragher* and *Ellerth*, employers can be vicariously liable when supervisors sexually harass their workers, even when top management has no knowledge whatsoever of the harassment. In this regard, *Gebser* sets a tougher standard for students in school than is applied to adult employees in the workplace.

By setting such a high bar for recovering damages under Title IX, the Court effectively puts this remedy out of reach for most litigants, which has very serious implications for their ability to enforce their rights under the statute. Damages have been recognized as an important part of Title IX's enforcement scheme, in part because students, by their nature, are a transient population. For example, enjoining a school district from allowing a sexually hostile environment to persist does no good for the student-victim who has graduated and now is attending college. Lacking a damages remedy, many students subjected to sexual harassment simply will be left without a means to vindicate their rights.

In this regard, *Gebser* is at odds with Title IX's goal of protecting individuals from sex discrimination in federally funded education. We urge the Administration to work with Congress to enact legislation that would restore the full range of remedies for sexual harassment under Title IX, and to ensure that students are provided with at least the same protection from sex discrimination as is afforded adults in the workplace.

Endnotes

[1] Statement of President Clinton on Strengthening Title IX Enforcement (June 17, 1997).

[2] Meg Sommerfeld, "Parity on the Playing Field," *The School Administrator*, at 32, 34 (Nov. 1998).

[3] HEA §§ 401(b) and 401(c)(3)(A)(ii)(II), Public Law No. 105-244 (1998).

[4] HEA § 419N.

[5] HEA § 485(g).

[6] HEA § 861.

[7] HEA § 485(f).

[8] HEA § 826.

[9] HEA § 827.

[10] HEA §§ 485(f)(1)(F)(i) and (ii).

[11] HEA §§ 826(a) and (b).

[12] HEA § 826(g).

[13] HEA § 827.

[14] Public Law No. 105-332 (1998).

[15] The programs were last reauthorized in 1990.

[16] Perkins Act § 2.

[17] National Coalition for Women and Girls in Education, *Title IX at 25: Report Card on Gender Equity*, at 16 (1997).

[18] The National Coalition for Women and Girls in Education (NCWGE) is a nonprofit organization of more than 50 organizations dedicated to improving educational opportunities and equality for women.

[19] Perkins Act § 3(17).

[20] Perkins Act §§ 3(23)(C), (D) and (E). "Special populations" also include individuals with disabilities; individuals from economically disadvantaged families, including foster children; and individuals with other barriers to educational achievement, including individuals with limited English proficiency. Perkins Act §§ 3(23)(A), (B) and (F).

[21] Perkins Act § 112(a)(1).

[22] Perkins Act § 112(a)(2)(B).

[23] Perkins Act § 112(c).

[24] Perkins Act § 113(b)(2)(A)(iv).

[25] Perkins Act § 113(c)(2).

[26] Perkins Act § 121(a)(1)(A).

[27] Perkins Act § 122(c)(8).

[28] Perkins Act § 122(c)(17).

[29] The Act permits the Secretary of Education to issue regulations "only to the extent necessary to administer and ensure compliance. . . ." Perkins Act § 324.

Chapter XIX

Federal Fair Housing Enforcement: The Second Clinton Administration at Mid-term

by John P. Relman

Introduction

At the end of the first Clinton term, the Citizens' Commission on Civil Rights reported that the Department of Housing and Urban Development (HUD) had made "only modest progress" in enforcing the Fair Housing Act, and had not "fully realized the initial hopes for this Administration."[1] The Commission's chief criticisms focused on HUD's inability to gain control of a growing backlog of cases and its reluctance to show "strong and consistent leadership" on a series of important fair housing policy issues.[2]

The Commission also concluded that the Housing Section of the Civil Rights Division at the Department of Justice had continued to assert its "traditional leadership role" in prosecuting fair housing cases, with successful enforcement initiatives in the insurance and lending discrimination fields, and a series of successful cases based on testing evidence.[3] The Commission noted with approval that monetary relief obtained by the Housing Section had continued to increase, and that more resources seemed to be available to develop new pattern and practice cases.[4]

Midway through the second Clinton term, the Justice Department's impressive fair housing enforcement efforts have continued largely unchanged. Over the last two years the testing program has produced large settlements in cities across the country; the Department's lending cases—although somewhat fewer in number—have yielded several important victories; and the Department has launched a long overdue enforcement initiative designed to ensure compliance with the Fair Housing Act's accessibility requirements for multi-family housing. Although new case filings have decreased overall, much of this decline is attributable to HUD's failure to refer or "charge" more cases. Per case damage awards have remained substantial in size, with little change from the levels recorded in the previous two-year period. If the Department can be faulted in any area, it would be its failure to take full advantage of the lightened caseload to significantly increase the number of new pattern and practice cases.

HUD's performance, on the other hand, has been decidedly mixed. On the positive side of the ledger, Secretary Andrew Cuomo has done a remarkable job in a difficult political climate of protecting HUD's fair housing budget and of promoting certain high-profile settlements in a way that has kept the public and Congress focused on the continuing need for fair housing enforcement. Due to Cuomo's efforts, HUD's fair housing budget will increase by 33% for FY1999, and will contain funding for a nationwide testing audit aimed at measuring levels of housing discrimination, as well as renewed funding for private fair housing enforcement programs. Secretary Cuomo also deserves credit for supporting new regulations that will make fair housing compliance a requirement for receipt of funds through many HUD programs.

On the negative side, HUD has shown little improvement over the last two years in its ability to process fair housing complaints effectively and expeditiously. While the number of complaints filed with HUD has risen, the percentage of cases charged—that is, cases where HUD has found discrimination—has declined precipitously. Surprisingly, this development has come in the face of President Clinton's public challenge to HUD to double the number of fair housing enforcement actions. Depressed levels of cause findings have resulted in an underutilization of the HUD administrative law judge process, and a steep decline in referral or "election" cases filed by the Justice Department. Equally important, the backlog of over-age cases has remained largely unchanged, despite efforts at management reform and attempts to improve the agency's computer and data systems.

Notwithstanding these continuing problems, HUD has still managed to win several ground-breaking settlements in the lending and insurance fields—areas where HUD has not had success in the past—and has succeeded in nearly tripling the average monetary relief won for victims of discrimination in HUD-brokered conciliations. Secretary Cuomo's administration clearly deserves credit for these accomplishments.

The remainder of this chapter is divided into three sections. Part I focuses on HUD's fair housing performance over the last two years, analyzing both policy initiatives and case management problems. Part II assesses the Justice Department's performance. This section focuses on new cases filed, significant case settlements, and successful program initiatives. Conclusions and recommendations are set forth in Part III.

I. The Department of Housing and Urban Development

A. Funding for Fair Housing Enforcement

At a time when conservatives in Congress have made no secret of their desire to dismantle HUD, it is remarkable to find that the FY1999 HUD budget contains a 33% increase (from $30 to $40 million) for fair housing programs.[5] Congress approved this increase only after Secretary Cuomo requested a 73% increase in the FY1999 budget for the Office of Fair Housing and Equal Opportunity.[6]

This achievement is nothing short of stunning. It is the product of adroit political maneuvering by Secretary Cuomo, a tenacious commitment by HUD's leadership to fair housing enforcement, and a highly effective media campaign designed to make sure HUD publicizes its high-profile fair housing cases and receives its share of credit for management reforms and downsizing. The campaign is working. For many in Congress, Secretary Cuomo has managed to create the image of a slimmed-down HUD bureaucracy that has made fighting racial discrimination in housing its top priority.

These efforts to obtain funding are important, and deserve both praise and recognition from the advocacy community. Funding for the Fair Housing Initiatives Program (FHIP), for example, has remained strong at between $15 and $17 million per year.[7] This program channels much-needed enforcement dollars directly to private nonprofit fair housing testing organizations around the country. Secretary Cuomo has also won funding for several nationwide testing audit studies designed to measure levels of housing and lending discrimination across the country.[8] Like FHIP, these studies are vitally important to the advocacy community. By documenting the extent of the problem, these studies will help ensure that public support for combatting discrimination remains high.

At the same time, funding is only effective in fighting discrimination if the enforcement mechanism and procedures of the agency work efficiently. As discussed below, there has been little improvement over the last two years in the processing of fair housing complaints by mid-level employees at HUD. The end result for many complainants has been too little relief, too long delayed.

B. Annual Reports

The Fair Housing Act requires that the Secretary of HUD publish an annual report to Congress describing the progress that has been made in enforcing the Fair Housing Act. The Act specifies that the report must contain "tabulations" showing the number of fair housing investigations that have not been completed within 100 days of the date the complaint was filed.[9]

Ever since the passage of the Fair Housing Amendments Act in 1988, HUD has failed to publish reports in a timely manner. In the 1997 Commission Report, the Commission noted that no annual report had been issued for either 1995 or 1996.[10] Little has changed since then. HUD has yet to produce an annual report on the state of fair housing for 1997, or 1998.

This lapse is not trivial. Although the author was able to obtain internal HUD draft statistical summaries for the purpose of writing this chapter,[11] the absence of annual reports makes it difficult, if not impossible, for complainants and fair housing advocates to know the facts concerning over-age cases, and whether that backlog is growing. These data are significant, for they serve as an important indicator of the likelihood that a complainant will receive a prompt adjudication. A complainant is entitled to know this information before deciding whether to use the government enforcement process or pursue a Fair Housing Act claim in federal or state court.

C. Complaint Processing

1. Complaints Received

Overall, the total number of fair housing complaints filed across the country with both HUD and state and local agencies in 1996 and 1997 remained essentially constant at approximately 10,000 complaints.[12] Yet complaints received by HUD alone have risen steadily since 1995. In that year, HUD received 2,950 complaints.[13] In 1996, the number of complaints received by HUD jumped to 4,274, and in 1997, the number rose again to 6,120.[14]

2. Complaints Charged

Under the Fair Housing Act, HUD is required to investigate all complaints of discrimination. If HUD concludes at the end of the investigation that there is reasonable cause to believe that discrimination has occurred, it must issue a charge. It is the issuance of the charge that triggers the complainant's right either to proceed before an administrative law judge or have the Department of Justice prosecute the case in federal court. If there is no "cause finding" and no basis for issuance of a charge, the case is dismissed.[15]

The decision whether to issue a charge is of critical importance to the complainant. It determines whether the case will proceed to trial or will be dismissed. The number of charges filed also serves as a barometer of HUD's willingness to find and prosecute discrimination.

What is most remarkable about the surge in complaints received by HUD from 1995 to 1997 is that it has been accompanied by a decrease in the number and percentage of cause findings. In 1994 and 1995, for example, HUD issued cause determinations in fully 8%, or 224, of the cases it resolved.[16] In 1996, HUD issued cause determinations in only 1.6%, or 120, of the 7,243 total cases it resolved.[17] In 1997, the percentage dipped yet again, this time to 1.2%, or 76 of the approximately 6,300 cases it resolved.[18]

Clearly, the trend is moving in the wrong direction. It seems unlikely that the quality of the cases received by HUD has changed so dramatically over the last two years. Rather, at a time when Secretary Cuomo has proudly and publicly accepted President Clinton's challenge to double the number of fair housing enforcement actions,[19] it appears that HUD investigators and regional counsel have inexplicably raised the bar for complainants to have their case heard by a fact finder, whether it be an administrative law judge or a federal jury. It is this decline in the number of cause findings that has, in turn, led to the reduction in election case filings by the Department of Justice (discussed in Part III, below).

3. Timeliness of Investigations

The Fair Housing Act, as amended in 1988, mandates that HUD complete its investigation of a complaint within 100 days "unless it is impracticable to do so."[20] Failure to meet this requirement, however, has never been held to constitute a jurisdictional bar to prosecution of a complaint.[21] As a result, since 1988 HUD has routinely allowed complaints to stagnate—many times for as much as a year past the 100-

day limit.[22] These delays are devastating. Witnesses disappear or die, memories become hazy, complainants lose heart, and defendants complain loudly at trial about the lack of a speedy and fair adjudicatory process.

HUD's early difficulties in meeting the 100-day limit following passage of the Fair Housing Amendments Act were the subject of focused and sustained criticism by fair housing advocates.[23] In response to this criticism, HUD appeared to make some progress in 1993 and 1994,[24] but the timeliness of its investigations always remained a sore point.

The most recent data indicates that over-age cases[25] remain a major problem. Overall, there has been little reduction in the backlog of over-age cases over the last two years. In 1996, HUD closed 2,660 over-age complaints, leaving a backlog at the end of 1996 of 1,459 over-age complaints.[26] In 1997, HUD closed only 1,512 over-age complaints, leaving an inventory at the close of 1997 of 1,414 of these older complaints.[27]

In both respects—numbers of over-age complaints closed and success in reducing the backlog—the most recent statistics do not augur well for further reduction of the backlog. Although the increase in complaints received from 1995 to 1996 may explain in part why HUD closed nearly 1,000 fewer over-age cases in 1997 than in 1996, it still does not explain why the backlog of over-age cases remained virtually unchanged at more than 1,400 at the end of 1997. Until that number is brought under control, the HUD complaint process will fall short of Congress's goal of providing a fast, inexpensive, and effective adjudication process for victims of housing discrimination.

D. Compensation to Victims

1. Settlements and Conciliations

The amount of monetary relief that HUD has been able to win for victims of housing discrimination through settlement has increased dramatically over the last few years. In 1995, HUD won roughly $2.4 million in relief for victims of discrimination. This amount represented a 34% increase from the prior fiscal year.[28] In 1996, relief increased again to $4,387,000.[29] On average, HUD won approximately $9,000 for each complaint that conciliated for monetary compensation.[30] In 1997, total compensation surged to $10 million, with complaint averages tripling to more than $28,000 per conciliated complaint.[31] Clearly, this constitutes an important and welcome development for which HUD deserves both support and credit.

At the same time, the number of successful settlements and conciliations, as a percentage of total cases resolved by HUD, has in recent months decreased. In 1996, for example, HUD successfully settled or conciliated 1,103 complaints, or approximately 15% of the total number of cases that it resolved that year.[32] In 1997, HUD successfully settled or conciliated only 757, or 12% of the total cases resolved that year.[33] Notwithstanding this data, the trend with respect to compensation through settlement and conciliation is clearly moving in the right direction.

2. Administrative Law Judge Decisions

The number of cases tried to decision before HUD administrative law judges (ALJs) decreased substantially over the last two years. This decline was due to a decrease in the number of cases charged and an increase in the number of complainants and respondents electing to have charged cases prosecuted by the Department of Justice. In 1996, parties elected to have 70% of charged cases handled by the Justice Department.[34] In 1997, the election rate decreased slightly, but still remained at the surprisingly high rate of 61%.[35] The end result has been an underutilization of the HUD administrative law judge hearing process that in recent months has, sadly, left HUD's highly competent and skilled ALJs all but looking for more work.

In 1996, HUD ALJs decided only five cases, finding for the complainant in each case. These five cases resulted in a total of $118,000 in damages and $24,000 in civil penalties.[36] In 1997, HUD ALJs decided nine cases, finding for the complainant in six of the cases.[37] Damages were not as high as in 1996. Complainants obtained only $57,000 and the ALJs awarded a total of $17,000 in civil penalties.[38]

The small number of decisions makes it impossible to draw conclusions about trends, or to compare either aggregate damage totals or per case averages obtained during the last two years with amounts awarded in prior years. What is clear, however, is that the range of individual damage awards ($1,000 to $40,000) remained essentially unchanged from prior years.[39]

E. Policy Initiatives

1. Lending and Insurance Investigations

Sensitive to criticism that it had failed to produce any significant lending or insurance settlements, HUD announced in 1996 that it would make these two areas priorities for future enforcement. Although it still has not produced any Secretary-initiated insurance complaints, in 1996 and 1997 HUD played an important role in helping to conciliate two major homeowners' insurance discrimination complaints brought by the National Fair Housing Alliance.

The first of the complaints, filed against State Farm, resulted in extensive changes to State Farm's underwriting guidelines, the creation of new sales and service centers in underserved urban locations, and a commitment to invest millions of dollars with community development corporations to help open up racially and economically diverse communities to the full range of conventional homeowners' insurance products that have long been available to white consumers.[40]

In January 1997, a similar settlement was reached with Allstate. Like State Farm, Allstate agreed to create new sales and service centers in African American or Latino neighborhoods in 4 cities, and establish "Neighborhood Partnership Programs" in 22 others.[41]

Prior to 1998, HUD's efforts in the area of lending enforcement had been limited to a series of unenforceable "Best Practices" agreements signed by members of the Mortgage Bankers' Association. These agreements required the signatories to pledge not to discriminate and to make best efforts to increase the number of loans sold to low-income and minority homebuyers. Although HUD made much of these agreements, critics charged that they were largely ineffective precisely because they were not targeted at companies alleged to have engaged in discriminatory practices, and because the terms of the agreements did not legally obligate the signatories to change their underwriting practices or invest specific dollar amounts in underserved minority communities.

In the spring of 1998, however, Secretary Cuomo won considerable press attention with the announcement of two settlements of HUD's first Secretary-initiated lending discrimination complaints, each one in excess of $1 billion. The first of the complaints, filed against Temple Inland Mortgage Corporation, Banc One Mortgage Corporation, SFM Mortgage Corporation, and Overton Bank and Trust, alleged that these companies treated African American loan applicants less favorably than white applicants. Altogether, the four respondents agreed to set aside $1.35 billion in loans to low-income and minority applicants.[42]

The second complaint, based on similar charges and filed by the Fort Worth Human Relations Commission with HUD against AccuBanc Mortgage Corporation, produced an unprecedented $2.14 billion in loan commitments to minority and low-income loan applicants.[43]

It is difficult to compare these lending settlements to those won by the Justice Department because they do not provide direct compensation to identified victims of discrimination. Rather, the HUD settlements involve the allocation of loan commitments that may well have been invested in minority or low-income census tracts even absent the filing of these complaints with HUD.

Yet it is important not to underestimate the value of the headlines these settlements secured. In trumpeting the settlements, Secretary Cuomo was able to announce HUD's entry into the lending enforcement area in a way that reminded Congress that government enforcement of civil rights laws can be effective without being heavy-handed. Unlike the Chevy Chase Bank settlement won by the Department of Justice in 1992,[44] the Temple Inland and AccuBanc settlements produced no backlash within the industry. As discussed further below, these settlements are one more example of Cuomo's skill in using the media attention attracted by high-profile cases to promote his agenda.

2. Use of High-Profile Investigations

Secretary Cuomo's success in focusing media attention on HUD's best fair housing complaints has not been limited to the AccuBank and Temple Inland settlements. Over the last two years, Cuomo has repeatedly won press coverage for HUD's role in investigating egregious examples of housing discrimination. These cases have been highlighted in HUD publications, press releases, press conferences, and reports to Congress. Most have involved highly sympathetic claims of racial harassment, hate, and violence.[45]

Detractors have been quick to criticize these efforts as a type of media spin, designed to divert attention from the general inefficacy of HUD's overall enforcement program and promote Secretary Cuomo's oft-debated personal political ambitions. These criticisms, however, miss the point. The media attention devoted to these cases has proven remarkably successful in helping HUD preserve its fair housing budget.

To be sure, the management failings discussed above are serious and demand immediate attention. But the entire discussion would quickly become academic were Congress to succeed in eviscerating funding for fair housing. Regardless of his motives, Secretary Cuomo deserves credit for the skill with which he has used HUD's successes to preserve the Department's standing with the public and Congress.

3. Proposed Rulemaking

At present, to apply for HUD funding through programs such as Community Development Block Grants, Home Investment Partnerships, Emergency Shelter Grants, or Housing for Persons with Aids, applicants must submit a Consolidated Plan, which in turn must include an analysis of "impediments to fair housing choice." This requires the applicant to analyze impediments to fair housing and design a plan to allocate its federal housing community development funds to address those problems.[46] In effect, this requirement serves as an alternative means by which HUD can promote enforcement of the Fair Housing Act.

Over the last two years, HUD has taken important new steps to attempt to use the leverage of program funding to ensure fair housing compliance. The focus of these efforts has been a proposed rulemaking designed to make fair housing a program requirement for all of the Department's many grant programs. Thus, in 1998, HUD proposed new regulations that for the first time provide performance review standards to evaluate whether a recipient of Community Development Block Grant funds has taken appropriate steps to identify and eliminate impediments to fair housing.[47] More important, these new standards would bar a community charged by HUD or the Justice Department with fair housing violations from receiving Community Development Block Grant funds. HUD has proposed similar requirements for all Community Planning and Development Programs.[48]

These proposals can only serve to increase community vigilance against discrimination and improve compliance with the Fair Housing Act. Here again, HUD deserves support and credit from the advocacy community for its efforts and initiative.

4. Funding of Studies

In 1991, HUD funded a major study designed to measure levels of housing discrimination in cities across the country. The study was conducted by The Urban Institute and involved the use of civil rights "testers." The study found persistently high levels of discrimination in housing and played an important role in the legislative battle to maintain funding for government civil rights enforcement efforts.[49]

Although HUD is mandated by the Fair Housing Act to conduct periodic studies to measure levels of discrimination,[50] no study has been completed since 1991. In 1997, however, Secretary Cuomo announced that the Department would undertake two studies, one aimed at measuring levels of lending discrimination, and the other aimed at determining the level of compliance with accessibility requirements.[51] In 1998, Cuomo announced HUD's intent to spend $7.5 million to fund a massive third study involving 3,000 to 5,000 matched pair tests. This study would measure levels of discrimination in the sale of homes across the country.[52]

All of these studies are long overdue. Proper assessment of the results will have to await a future report, but Secretary Cuomo's administration must be commended for allocating the funds for these studies and recognizing their completion as Department priorities.

5. Management Reform Efforts

In May 1997, HUD implemented a series of self-styled "management reforms" recommended by Price Waterhouse. Shorn of the fancy language, the Price Waterhouse innovations amounted to recommendations that HUD update the computer system used to organize and prepare investigations and investigative reports; screen complaints that do not raise fair housing issues before they enter the investigative system and trigger the complaint process; and make better use of both mediation and arbitration as ways to resolve complaints quickly.[53]

HUD claims that in three "pilot offices" where new technology recommended by Price Waterhouse has been tried, the length of investigations has been reduced from an average of 208 days to 75 days.[54] No public data exists upon which to test HUD's assertions. Given HUD's poor track record over the last decade in conducting timely investigations, it is difficult to imagine that there is any magic solution—no matter how good the "technology"—that will speed HUD's complaint processing overnight.

Likewise, it seems unlikely that either screening frivolous complaints—a function one can only assume HUD has long performed in some fashion or other—or an increased reliance on mediation will have a marked effect on the speed with which complaints are investigated if the real problem is HUD's investigators' inability to identify relevant facts, analyze evidence, and apply the law in a reasonably expeditious fashion.

In the end, only time and case statistics will tell whether any of these proposed "reforms" are worth the taxpayer money paid to Price Waterhouse.

II. The Department of Justice

A. New Cases Filed

Under the Fair Housing Act, the Department of Justice has the power to bring primarily two types of cases: pattern and practice cases and "election" cases.[55] The latter are complaints that have been filed with HUD and charged by the Secretary. Once a charge is issued, either party—complainant or respondent—may "elect" to have the case prosecuted by the Justice Department in federal court. If an election is made by a party, the Department is required to file suit. With pattern and practice cases, on the other hand, the Department has discretion to file if it concludes that the evidence is strong enough to support a finding that a pattern or practice of discrimination exists.

Over the last two years, the total number of new pattern and practice case filings remained roughly unchanged from the previous two years. In 1995 and 1996, the Department filed a total of 34 new pattern or practice cases.[56] In 1997 and 1998, the Department filed a total of 39 pattern or practice cases. Of these filings, 16 were the result of testing done by the Department, 4 were lending cases, 1 was an insurance case, 2 were zoning cases, and 13 fell into a variety of other categories.[57] This breakdown is virtually identical to the previous two-year period (14 testing; 6 lending; 1 insurance; 13 other).[58]

Election case filings, on the other hand, declined dramatically. In 1995 and 1996, the Department filed a total of 149 election cases.[59] During the last two years the Department filed 57 election cases.[60] The break point appears to have come in

1996, when election case filings dropped from 112 to 37. Since 1996, the number of new election cases has remained relatively constant, with an average of 30 new filings per year.[61]

It is difficult to know precisely what to make of these filing trends. The Justice Department can hardly be faulted for HUD's failure to charge more cases. At the same time, one would expect to see a measurable rise in the number of pattern and practice case filings given the resources now available as a result of the drop in election case filings. In 1995, for example, the Department filed 112 election cases and 15 new pattern and practice cases. In 1997, election case filings dropped to an all-time low of 23, but new pattern and practice case filings remained unchanged at 14.[62] The trend seems even more problematic when one considers that most, if not all, of the new election cases are routinely delegated to local U.S. Attorneys' offices for prosecution.

In fairness to the Justice Department's Housing Section, it may be unreasonable to assume that a staff of 45 attorneys could, under any circumstances, effectively prosecute the type of caseload generated by more than 100 new case filings per year. Yet it is a reasonable question to ask whether the Section's full potential is being realized with a filing rate of 20 to 25 new cases per year.

B. Damage Awards

A bright spot in the Department's enforcement program remains its impressive damage awards. As a general matter, the 1997–98 pattern remained similar to previous years: pattern and practice testing cases produced settlements in the $500,000 to $1 million range; election cases produced settlements mostly in the $15,000 to $100,000 range; and a handful of larger pattern and practice lending and insurance cases resulted in settlements ranging from $2 million to $14 million.[63]

Comparing aggregate totals between years can be misleading because one or two large settlements may drive the outcome for the entire year. A few statistics, however, demonstrate the continued strength of the Justice Department's overall enforcement effort.

In FY1996, the Justice Department settled or won 51 election cases, recovering a total of approximately $1.3 million. Per case relief for these cases came to roughly $25,000.[64] In 1997, the Department won or settled only slightly fewer election cases (41), obtaining $872,000 in total relief, or approximately $21,000 per case.[65] The 1998 statistics reflect the decline in election case filings, but the per case recoveries are virtually unchanged. In that year the Department settled or won 14 election cases, generating a total of $311,000 or $22,000 per case.[66]

The trend for pattern and practice cases is similar. In FY1996, the Justice Department settled or won 26 pattern and practice cases, recovering approximately $15 million in relief. More than half of that total, however, was attributable to two lending cases, and four cases accounted for 4/5 of the total.[67] In 1997, 25 pattern and practice cases produced more than $26 million in total relief. As in the previous year, 2 of the 26 cases were responsible for the bulk of the damages (approximately $22 of the $26 million).[68] In 1998, the Housing Section settled or won 16 pattern and practice cases. These cases produced roughly $4.3 million in damages, an amount virtually identical to the 1997 total (after adjustment to exclude the two highest settlements).[69]

In short, despite annual fluctuations in the total number of cases tried or settled, the Housing Section is continuing to win significant and important damage awards for victims of discrimination. In many parts of the country, the Department's settlements are setting the pace for fair housing damage recoveries in both the private and public sectors.

C. Enforcement Initiatives

The Justice Department's fair housing enforcement initiatives have focused on three important and necessary priorities: the testing program; lending and homeowners' insurance discrimination; and access for persons with disabilities in newly constructed multi-family housing. In each of these areas the Department has continued to make substantial progress.

1. Testing Program

The Housing Section's testing program remains one of the Justice Department's most impressive success stories. Since 1992, when the first cases based on the Department's own testing evidence were filed, the program has resulted in the filing of more than 50 pattern and practice cases. All told, these cases have yielded more than $8 million in damages for victims of discrimination.[70]

Nearly half of that total relief, or roughly $3.6 million, was generated through 11 testing case settlements achieved in FY1997.[71] Two of those settlements, *United States v. Chandler Associates*[72] and *United States v. Kendall House*,[73] produced settlements in excess of $1 million. Four other testing cases settled in 1997 each produced more than $100,000 in damages.[74] In 1998, the Department produced fewer testing case settlements, but the results were no less impressive: seven settlements yielded a total of $600,000 in damages,[75] with three cases each producing settlements in excess of $100,000.[76]

The continued success of the testing program is important for three reasons. First, the Housing Section has been able to use its staff of testers to bring enforcement actions in parts of the country that have historically seen little in the way of fair housing litigation. The use of testing evidence, for example, has allowed the Department to bring successful cases in the deep South and remote areas of the Midwest. In short, the program has enabled the Department to meet its goal of enforcing the Fair Housing Act from coast to coast.

Second, the testing cases have resulted in the development of "victim funds," a useful alternative to the class action settlement approach. In testing case settlements where this type of fund has been created, money is set aside for qualified individuals who are able to demonstrate that they were harmed by the defendant's discriminatory practices. In this way, a case that begins with no identified "bona fide" victims of housing discrimination may yield monetary relief for hundreds of individuals later determined to have been victims of the illegal practices exposed by the testers.

Third, the success of the Department's testing cases has provided private, nonprofit fair housing organizations with a readily achievable methodological model to follow in conducting their own testing. As more courts of law around the country recognize the competence of the type of testing evidence and methodology used by the Justice Department, it becomes easier for the private sector to bring and win its own testing cases.[77]

2. Lending and Homeowners' Insurance Discrimination

Like the testing program, since 1992 the Department's enforcement efforts in the area of lending discrimination have been highly successful. During the past two years the Justice Department has continued to state that prosecution of lending cases is a priority for the Housing Section, although the number of actions filed and settled has diminished slightly from previous years. In 1995 and 1996 the Housing Section filed a total of six new lending cases; in 1997 and 1998 it filed four.[78] From 1995 to 1996 the Section settled five lending cases;[79] during the last two years it settled only three.[80]

All three of the case settlements, however, were significant. In *United States v. Albank*,[81] the Department won an $8.9 million settlement based on evidence showing that the bank had refused to make or market loans in minority census tracts in Connecticut and New York. In *United States v. First National Bank of Gordon, Nebraska*,[82] the Department obtained a $275,000 settlement on behalf of Native Americans denied the right to purchase loans on the same terms as white applicants. And in *United States v. First National Bank of Dona Ana County*,[83] the Department won a $585,000 settlement in a discriminatory pricing case alleging that the bank charged Hispanic loan applicants more than white applicants to purchase the same loan product.

These three cases demonstrate the variety and diversity of the Department's lending discrimination cases. Each settlement is impressive and important, but given the Attorney General's publicly stated position that lending is an enforcement priority, the

Department could reasonably be criticized for not having more such cases. This is particularly true given the private bar's general reluctance to pursue these cases, and the unique advantage that the Department's ability to access bank records gives it in conducting a pre-suit investigation.[84]

One area overlooked by these settlements is that of discrimination in the "sub-prime" lending market. Sub-prime lending refers to the practice of selling high-interest rate loans to individuals who lack the necessary credit history to obtain a loan from an "A" paper lender, such as Citibank or Bank of America. In these situations, mortgage companies may exploit the applicant's inability to shop the market by selling loans at usurious rates, with the full intent of forcing the borrower into bankruptcy and foreclosing on the property.

Increasingly, fair housing advocates have begun to question whether these destructive and destabilizing practices and products are being directed intentionally at inner-city minority communities, and if so, whether such practices violate the Fair Housing Act.[85] Although the Department apparently has a number of sub-prime lenders under investigation, to date no cases have been filed. This will be an important area for the Department to focus on in the next two years if it is to retain its leadership role in the area of lending discrimination.

Enforcement efforts in the area of homeowner's insurance discrimination have remained virtually unchanged from prior years. The Justice Department brought its first homeowners' insurance discrimination case against American Family Mutual Insurance in 1995, winning a $16.5 million settlement.[86] During the last two years the Department has filed and settled only one other case—*United States v. Nationwide*.[87] That settlement came in 1997, and produced $13.2 million in community investment funds for a group of affected cities.

It is not clear why the Justice Department has filed so few cases against the insurance industry. The Department's early successes do not seem to have produced the level of enforcement activity that fair housing advocates envisioned. Although no public information is available about current investigations, the Department frequently emphasizes the importance of ensuring compliance within this industry. It remains to be seen whether the Department will be able to reassert its leadership role in this area over the next two years.

3. Disability Access in Newly Constructed Multi-Family Housing

The Fair Housing Act requires that certain types of multi-family housing constructed after March 1991 must meet stringent access standards for persons with disabilities.[88] Although it was widely recognized by fair housing advocates beginning in 1992 that a significant percentage of multi-family housing subject to these requirements was not in compliance, little was done about the problem until this past year, when the Justice Department undertook the first high-profile, systemic enforcement actions against builders for violating these construction requirements.

As part of this initiative, the Department filed a total of seven accessibility cases in 1998, all alleging that developers had constructed new housing in disregard of Fair Housing Act requirements.[89] Several of these cases have already resulted in important settlements.[90] One in particular, involving Pulte Builders, has established an excellent model for private sector litigation. The settlement requires Pulte to retrofit units that are not in compliance, compensate individual applicants who could not gain access to the housing, and conduct a series of seminars in cities across the country designed to educate builders about federal requirements.[91]

This initiative has placed the Department at the forefront of an important new area of Fair Housing Act enforcement that is destined to grow dramatically in the next few years. The importance of the Department's efforts cannot be underestimated; by challenging the industry directly, the Justice Department has paved the way for the filing of private actions in federal court. Increased litigation by the private sector, coupled with rigorous government enforcement, should serve to increase dramatically the rate of compliance by the industry.

D. Opposition to H.R. 3206 and H.R. 589

The last two years were marked by a fierce battle on Capitol Hill over two pieces of proposed legislation designed to amend the Fair Housing Act to narrow its protections for persons with disabilities and families with children. H.R. 3206[92] and H.R. 589,[93] if passed, would have removed important protections for persons with disabilities living in group homes and made it far more difficult to challenge discriminatory zoning laws.

This legislation was vigorously opposed by an alliance of civil rights, disability, fair housing, and human services advocacy organizations.[94] To its credit, the Justice Department testified before Congress in opposition to the bills. In the end, the Department's lobbying effort played an important role in helping to defeat this legislation.

A renewed effort to amend the Fair Housing Act is expected to take shape in the 106th Congress. The same alliance that defeated H.R. 3206 and H.R. 589 is preparing to oppose any new conservative attack on the Fair Housing Act. If new legislation is to be defeated, however, the Justice Department's involvement will, once again, be vitally important.

III. Conclusion and Recommendations

For the most part, federal enforcement of the Fair Housing Act has marched steadily forward over the last two years, largely undisturbed by the political turmoil that has roiled much of Washington. The Justice Department has doggedly pursued its most successful program initiatives, prosecuted its existing caseload with workmanlike skill and efficiency, and avoided controversy. Secretary Cuomo has demonstrated masterful political skills in protecting HUD from a knife-wielding Congress while simultaneously raising public consciousness about the problem of housing and lending discrimination. Like the Justice Department, Cuomo has accomplished these goals without causing a backlash among industry groups or the conservatives in Congress.

HUD in particular, though, still has a long way to go before it can claim to have mastered the case management and processing problems that have vexed the agency since the passage of the Fair Housing Amendments Act in 1988. Ultimately, these are the issues that matter most to the many victims of housing discrimination who cannot afford a private attorney and who depend on the government to vindicate their rights. Whether real progress can be made in solving these problems in the final two years of the Clinton Presidency will be the true test of Secretary Cuomo's leadership.

A. Recommendations for the Department of Housing and Urban Development

1. *Secretary Cuomo should move quickly to determine why cause determinations, as a percentage of total complaints, have declined so dramatically in the past two years. Senior HUD management should take steps to ensure that investigators and regional counsel are applying proper legal standards in evaluating complaints. Where necessary, new training should be instituted to assist investigators in discovering relevant facts and assembling the evidence necessary to determine whether a charge should be issued. Secretary Cuomo should make it his first priority to ensure that cause findings are doubled between now and the end of FY2000.*

2. *The backlog of over-age cases must be brought under control. Secretary Cuomo should establish a strike force of top investigators and regional counsel to complete investigative reports on the oldest of HUD's pending complaints. The Secretary should allocate additional resources to the Office of Fair Housing and Equal Opportunity (FHEO) to ensure that all complaint investigations are completed in as close to 100 days as possible. If the Price Waterhouse "new technology" recommendations have in fact resulted in*

verifiable improvements in case processing efficiency at "pilot" offices, those reforms should be promptly implemented at all offices.

3. *To expedite merits determinations, FHEO staff should direct regional investigators to enlist the assistance of local private fair housing organizations wherever possible in conducting fair housing tests as soon as a complaint is filed.*

4. *Although there has been improvement in recent months, particularly in the lending and insurance areas, the number of Secretary-initiated complaints remains too low. Secretary Cuomo should direct the Office of General Counsel to investigate, prepare for litigation, and charge 25 Secretary-initiated cases before the end of FY2000.*

5. *Secretary Cuomo should promptly submit all overdue annual HUD enforcement reports to Congress.*

B. Recommendations for the Department of Justice

1. *With election case referrals from HUD declining, the Housing Section's first priority should be to increase the number of new pattern and practice case filings. The Section could reasonably be expected to increase by half the number of new cases filed between now and the end of FY2000.*

2. *Given the remarkable success of the Housing Section's testing program, the Attorney General should reallocate additional staff and funds to expand the program so that testing can be directed at more than just rental practices. Testing should be aimed, for example, at real estate sales companies that engage in interstate business, and at lending and insurance practices. If necessary, the Attorney General should fund ten new line attorney positions so that the Department will not be forced to delay the filing of fully prepared and investigated testing cases for lack of legal staff and resources.*

3. *If it is to retain its leadership role in the areas of lending and insurance discrimination, the Department must complete lending and insurance investigations faster and increase the number of new case filings. In particular, the Department should allocate additional resources to permit a more comprehensive investigation of the sub-prime lending market.*

4. *The Housing Section should redouble its efforts to work with the private sector and nonprofit community to identify issues, areas, and cases that would benefit from Justice Department intervention. The Housing Section should encourage the Attorney General to join with the private sector in opposing any future proposed legislation that, like H.R. 3206, would weaken the protections the Fair Housing Act affords to victims of discrimination.*

Endnotes

[1] Christine Robitscher Ladd, "Federal Fair Housing Enforcement: The Clinton Record at the End of the First Term," *in* Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration*, at 221 (1997) (hereinafter "1997 Commission Report").

[2] *Id.*

[3] *Id.* at 221-22.

[4] *Id.*

[5] Aspen Law & Business, *Fair Housing—Fair Lending Reporter*, at ¶ 12.5 (Dec. 1998).

[6] *Internal Draft U.S. Department of Housing and Urban Development (HUD) Report*, at 4 (1997) (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs) (hereinafter "1997 Draft HUD Report").

[7] *Id.* at 41.

[8] *Id.* at 13, 9; Aspen Law & Business, *supra* note 5, at ¶ 12.2.

[9] 42 U.S.C. §§ 3608(e)(2)(B)(i)-(iii).

[10] 1997 Commission Report, *supra* note 1, at 222.

[11] For purposes of compiling this chapter, HUD provided the Washington Lawyers' Committee for Civil Rights and Urban Affairs with internal draft reports containing case statistics and other information about HUD's programs for fiscal years 1996 and 1997. This information was the most comprehensive and reliable information about HUD available to the author at the time of publication. HUD was not able to provide any information about fiscal year 1998. Accordingly, the data contained in this chapter concerning HUD covers only the time period up to and including September 30, 1997.

[12] *Internal Draft HUD Report*, at 16 (1996) (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs) (hereinafter "1996 Draft HUD Report"); 1997 Draft HUD Report, *supra* note 6, at 21. Unless otherwise indicated, all references to calendar years in this chapter, such as "1996" or "1997," refer to fiscal years. This convention is followed because the government compiles its case statistics by fiscal year.

[13] 1997 Commission Report, *supra* note 1, at 222.

[14] 1996 Draft HUD Report, *supra* note 12, at 16; 1997 Draft HUD Report, *supra* note 6, at 21.

[15] 42 U.S.C. §§ 3610, 3612.

[16] 1997 Commission Report, *supra* note 1, at 224.

[17] 1996 Draft HUD Report, *supra* note 12, at 24. Total cases "resolved" includes any complaint that was disposed of by HUD in any fashion. Thus, this definition includes complaints that were screened out at the beginning of the process as frivolous, settlements and conciliations, and administrative closures (e.g., cases dismissed for want of prosecution by the complainant).

[18] 1997 Draft HUD Report, *supra* note 6, at 28.

[19] *Id.* at 4 (noting that as part of his "One America" initiative, President Clinton directed HUD in September 1997 to double the number of enforcement actions brought during the second Clinton term; and that in response Secretary Cuomo "announced his commitment to 'crack down' on housing discrimination").

[20] 42 U.S.C. § 3610 (a)(1)(B)(iv).

[21] See, e.g., *Kelly v. HUD*, 3 F.3d 951, 956 (6th Cir. 1993); *Baumgardner v. HUD*, 960 F.2d 572, 578 (6th Cir. 1992).

[22] See, e.g., John P. Relman, "Federal Fair Housing Enforcement: The Bush Record and Recommendations for the New Administration," *in* Citizens' Commission on Civil Rights, *New Opportunities: Civil Rights at a Cross-*

roads, at 87 (1993) (hereinafter "1993 Commission Report"); John P. Relman, "Federal Fair Housing Enforcement: The Clinton Administration at Mid-Term," *in* Citizens' Commission on Civil Rights, *New Challenges: The Civil Rights Record of the Clinton Administration Mid-term*, at 186 (1995) (hereinafter "1995 Commission Report"); R. Schwemm, *Housing Discrimination*, at 24-15 n.90.1 (1998).

[23] See 1993 Commission Report, *supra* note 22; 1995 Commission Report, *supra* note 22.

[24] 1995 Commission Report, *supra* note 22, at 183, 186.

[25] For purposes of this chapter, an "over-age case" is defined as a complaint not closed within 100 days from the date it was filed.

[26] 1996 Draft HUD Report, *supra* note 12, at 19.

[27] 1997 Draft HUD Report, *supra* note 6, at 29.

[28] 1997 Commission Report, *supra* note 1, at 224.

[29] 1996 Draft HUD Report, *supra* note 12, at 25.

[30] *Id.*

[31] 1997 Draft HUD Report, *supra* note 6, at 31-32.

[32] 1996 Draft HUD Report, *supra* note 12, at 24.

[33] 1997 Draft HUD Report, *supra* note 6, at 28.

[34] 1996 Draft HUD Report, *supra* note 12, at 31.

[35] 1997 Draft HUD Report, *supra* note 6, at 33.

[36] 1996 Draft HUD Report, *supra* note 12, at 32.

[37] See Schwemm, *supra* note 22, at Appendix E.

[38] 1997 Draft HUD Report, *supra* note 6, at 35.

[39] See Schwemm, *supra* note 22, at Appendix E (listing damage awards for each administrative law judge decision).

[40] See 1996 Draft HUD Report, *supra* note 12, at 37-38 (discussing terms of settlement); Aspen Law & Business, Fair Housing—Fair Lending Reporter, at ¶ 9.1 (Sep. 1996).

[41] See 1997 Draft HUD Report, supra note 6, at 7-8 (discussing terms of settlement); Aspen Law & Business, *Fair Housing—Fair Lending Reporter*, at ¶ 5.1 (May 1997).

[42] Aspen Law & Business, *Fair Housing—Fair Lending Reporter*, at ¶ 6.3 (June 1998).

[43] *Id.*

[44] *United States v. Chevy Chase Federal Savings Bank and B.F. Saul Mortgage Company*, C.A. No. 94-1824-JG (D.D.C. 1994) (settled with consent decree requiring bank to pay approximately $11 million to identified victims of discrimination).

[45] Several of these high-profile cases are summarized in the 1997 Draft HUD Report, *supra* note 6, at 7. In one case, for example, agents working for an apartment rental service wrote the word "Archie"—allegedly referring to Archie Bunker—on apartment listings as a code to identify landlords who would not allow their apartments to be shown to minorities. In another case, a man threatened to blow up a woman's house after she showed an apartment to a prospective tenant who was African American.

[46] See, e.g., 24 C.F.R. § 570.904 (Community Development Block Grants program requirements); 24 C.F.R. Part 91 (containing HUD regulations governing Consolidated Submission for Community Planning and Development Programs).

[47] 63 Federal Register 57,881 (Oct. 27, 1998).

[48] For a general discussion of the new proposed requirements, see Aspen Law & Business, *supra* note 5, at ¶ 12.6.

[49] M. Turner, R. Struyk, and J. Yinger, *Housing Discrimination Study: Synthesis* (HUD 1991) (estimating the incidence of discrimination for prospective black renters and home buyers at 53% and 56%, respectively,

based on 3,800 fair housing tests conducted in metropolitan areas across the country).

[50] 42 U.S.C. § 3608 (e)(1).

[51] 1997 Draft HUD Report, *supra* note 6, at 9.

[52] Aspen Law & Business, *supra* note 5, at ¶ 12.2.

[53] See 1997 Draft HUD Report, *supra* note 6, at 5-6.

[54] *Id.* at 5.

[55] 42 U.S.C. §§ 3614 (a), 3612 (o).

[56] Statistical information in this chapter about Justice Department case filings was provided by the Department of Justice upon request by the Washington Lawyers' Committee for Civil Rights and Urban Affairs. This information, compiled as a "Summary of Case Filings" and a computer spreadsheet entitled "Relief Statistics," is on file with the Washington Lawyers' Committee. This information was the most current and reliable data about the Justice Department's fair housing enforcement efforts available at the time of publication of this chapter.

[57] "Summary of Case Filings," *supra* note 56.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] "Relief Statistics," *supra* note 56.

[64] 1997 Commission Report, *supra* note 1, at 228.

[65] "Relief Statistics," *supra* note 56.

[66] *Id.*

[67] 1997 Commission Report, *supra* note 1, at 228.

[68] "Relief Statistics," *supra* note 56.

[69] *Id.*

[70] 1997 Commission Report, *supra* note 1, at 228; "Relief Statistics," *supra* note 56.

[71] "Relief Statistics," *supra* note 56.

[72] *United States v. Chandler Associates*, C.A. No. 97-3114 (D.N.J. June 25, 1997).

[73] *United States v. Kendall House*, C.A. No. 95-2050 (S.D. Fla. Nov. 19, 1996).

[74] *United States v. Forest Hills Realty*, C.A. No. 96-7171 (N.D. Ill. Apr. 30, 1997) ($350,000); *United States v. Rosemurgy*, C.A. No. 95-8351 (S.D. Fla. Nov. 18, 1996) ($190,000); *United States v. Gordon*, C.A. No. 95-8354 (S.D. Fla. Apr. 8, 1997) ($125,000); *United States v. Araich Anstalt*, C.A. No. 95-8355 (S.D. Fla. Nov. 16, 1996) ($120,000).

[75] "Relief Statistics," *supra* note 56.

[76] *United States v. Marsten Apartments, Inc.*, C.A. No. 95-75178 (E.D. Mich. Nov. 18, 1997) ($200,000); *United States v. Lexington Village Associates*, C.A. No. 97-5923 (D.N.J. Apr. 9, 1998) ($150,000); *United States v. Hillcrest Associates*, C.A. No. 97-5937 (D.N.J. Apr. 9, 1998) ($150,000).

[77] Many of the Justice Department's most successful testing cases have been litigated in conjunction with private fair housing organizations. The process of co-counseling testing cases has helped to show some of the newer organizations how to prepare and win a testing case. Equally important, a number of the settlements have included funds designed to provide continued support for private fair housing organizations, or funds to create new testing centers. See, e.g., *United States v. Kendall House*, C.A. No. 95-2050 (S.D. Fla. Nov. 19, 1996) ($90,000 of settlement funds allocated to Miami fair housing organization).

[78] "Summary of Case Filings," *supra* note 56.

[79] 1997 Commission Report, *supra* note 1, at 228-29.

[80] "Relief Statistics," *supra* note 56.

[81] *United States v. Albank*, C.A. No. 97-1206 (N.D.N.Y. Aug. 12, 1997).

[82] *United States v. First National Bank of Gordon, Neb.*, C.A. No. 96-5035 (D.S.D. May 7, 1997).

[83] *United States v. First National Bank of Dona Ana County*, C.A. No. 97-0096 (D.N.M. Jan. 29, 1997).

[84] Each of the bank regulatory agencies has statutory authority to review loan files of banks that fall within their jurisdiction. When the Justice Department receives a case referral from a bank regulatory agency for purposes of pre-complaint investigation, it is given access to all loan files reviewed by the agency.

[85] See, e.g., *Hargraves and the Fair Housing Council of Greater Washington v. Capital City Mortgage Corp.*, C.A. No. 98-237 (D.D.C. 1998) (alleging in part that Capital City's predatory lending practices have been intentionally directed at African American census tracts in the District of Columbia in violation of the Fair Housing Act).

[86] *United States v. American Family Mutual Insurance Co.*, C.A. No. 90-0759 (E.D. Wis. Mar. 30, 1995).

[87] *United States v. Nationwide Mutual Insurance Co.*, C.A. No. 97-291 (S.D. Ohio Mar. 10, 1997).

[88] 42 U.S.C. § 3604 (f)(3)(C).

[89] "Summary of Case Filings," *supra* note 56.

[90] See, e.g., *United States v. Country Oaks Development*, C.A. No. 97-8174 (N.D. Ill. July 22, 1998); *United States v. K-P Developers, Inc.*, C.A. No. 98-4441 (N.D. Ill. July 21, 1998).

[91] This case apparently has no docket number because it was settled pre-suit. The settlement agreement is on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs. For a general discussion of the settlement terms, see Aspen Law & Business, *Fair Housing—Fair Lending Reporter*, at ¶ 10.5 (Oct. 1998).

[92] H.R. 3206, 105th Congress (1998).

[93] H.R. 589, 105th Congress (1997).

[94] This alliance, known as the Coalition to Preserve the Fair Housing Act, has been ably led by Michael Allen, an attorney at the Bazelon Center for Mental Health Law.

Chapter XX

Federal Action to Confront Hate Violence: Continued Progress Will Require Sustained Commitment by Congress and the Administration

by Michael Lieberman[1]

I. Defining the Issue: The Impact of Hate Violence

In recent months, the issue of hate violence—and the efficacy of hate crime laws—has dramatically returned to the public consciousness because of the brutal and senseless bias-motivated murders in Jasper, Texas, in June 1998 and in Laramie, Wyoming, in October 1998. According to Federal Bureau of Investigation (FBI) statistics, there were approximately 6,000 murders nationwide between June and October, but it was the particularly violent and depraved manner in which these two men were killed—and the fact that James Byrd, Jr., and Matthew Shepard were murdered for no other reason than their race and sexual orientation, respectively—that has sparked calls for more effective federal, state, and local responses.

These victims, attacked for different reasons in different parts of the country, attracted national attention. In both cases, law enforcement officials aggressively pursued these crimes and apprehended the apparent perpetrators, who are now in custody facing severe consequences. Yet, thousands of hate crimes do not make national headlines. Too frequently, other victims of bias-motivated vandalism, hateful graffiti, threats, or assaults do not receive the police attention they merit.

All Americans have a stake in effective response to violent bigotry. These crimes demand priority attention because of their special impact. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities.

II. White House Leadership

Throughout his public life, President Clinton has demonstrated a great appreciation for the importance of intergroup understanding and cooperation. Because the President understands his own potential to shape attitudes, he has frequently utilized his "bully pulpit" to speak against intolerance and prejudice. In criticizing incivility and hate speech on the radio, in promoting improved intergroup relations, and in rolling up his own sleeves and taking up tools to help rebuild a church burned by malicious arsonists, President Clinton has proven that he is capable of promoting the highest ideals of intergroup harmony and improved race relations.

Yet, it is precisely because of the President's broad comfort and familiarity with race-related issues and because of his formidable communication skills that civil rights activists were disappointed with the Administration's lack of attention to these issues at the beginning of his presidency. While significant initiatives were under way in several federal agencies to address prejudice and hate violence, most of those programs had been mandated by Congress before President Clinton was elected in 1992. Administration officials initially demonstrated little enthusiasm for developing their own anti-prejudice initiatives. Until recently, Clinton Administration and Justice Department officials lacked a forward-looking, integrated approach to prejudice and hate violence. Over time, and with prompting from outside advocates and members of Congress, Administration officials have greatly improved interagency coordination of existing programs and have developed their own significant initiatives to address prejudice and bias-motivated criminal acts. The results have been very encouraging.

The first two years of the second term of the Clinton Administration have been characterized by an unprecedented White House commitment to improve race relations and address hate crimes in an inclusive and comprehensive manner. During this time, President Clinton has established a Race Initiative, hosted a national conference on hate crimes, and, on many occasions, spoken out in support of improved intergroup relations and against prejudice, bigotry, and bias-motivated violence.[2] Other Cabinet officials—most notably Attorney General Janet Reno—have also repeatedly spoken out against hate violence and have sparked the development of a number of important new federal initiatives.[3]

A. The President's Initiative on Race

On June 13, 1997, the President issued an Executive Order establishing his Advisory Board on Race.[4] The President provided an ambitious—and daunting—mandate for the Advisory Board.[5] Over 15 months, the Board held forums on a wide range of issues affecting race relations in America, including crime, demographics, attitudes and stereotyping, education, housing, administration of justice, immigration, and civil rights enforcement. The Board heard presentations from many of the nation's most prominent advocates and experts on these issues. The Board's useful final report[6] included a number of broad recommendations and, importantly, identified a number of successful local programs and promising practices worthy of replication.[7] Though many have criticized the President's Race Initiative as, among other things, overambitious and underachieving, perhaps nothing short of a dramatic race riot could have sparked hundreds of articles, community forums, and local discussion groups on racial issues. Because the Race Initiative has prompted this national conversation in a positive and productive way, it has earned the right to continue its mandate.

B. The White House Conference on Hate Crimes

This national conference, the centerpiece recommendation of an influential report released in January 1997 by the Leadership Conference Education Fund and the Leadership Conference on Civil Rights,[8] was announced by the President in his June 7, 1997, radio address devoted to the issue of hate violence. In eloquent terms, the President pledged "to mount an all-out assault on hate crimes, to punish them swiftly and severely, and to do more to prevent them from happening in the first place."[9] The President highlighted the fact that the Justice Department had been engaged in "a thorough review of the laws concerning hate crimes and the ways in which the federal government can make a difference to help us to build a more vigorous plan of action."[10]

In the months following the radio address, Justice Department and Department of Education officials prepared comprehensive inventories of existing federal resources and programs on the issue. Justice Department working groups met repeatedly, soliciting input from government experts, law enforcement groups, academics, and civil rights activists to build on existing programs, assess future needs, and establish priorities.

Under President Clinton's leadership, activists from across the country gathered in Washington on November 10, 1997, for the first White House Conference on Hate Crimes. The Conference went far beyond the usual photo opportunities and Presidential pomp. In speeches, panels, and workshops throughout the Conference, the President, the Vice President, and six Cabinet members stressed the importance of direct action against bias-motivated crime. The diverse panels included presentations on effective law enforcement and educational strategies to confront this national problem.

The Conference provided a forum for the announcement of a number of significant and promising law enforcement and educational initiatives to confront hate violence:

- *Regional U.S. Attorney-led Police-Community Hate Crime Working Groups (HCWGs).* At the heart of the Administration's proposals was a well-conceived strategy to improve local community coordination among affected parties in responding to hate crimes. Ideally composed of representatives of the judicial district's U.S. Attorney's Office, FBI investigators, state and local law enforcement officials, prosecutors, community-based organizations, and civil rights groups, these HCWGs were designed to enhance communication on hate crime investigations and prosecutions, improve hate crime data collection efforts, and promote expanded law enforcement training.[11]

- *Coordinated Law Enforcement Hate Crime Training Programs.* The President announced the development of a model hate crime training curriculum for federal, state, and local law enforcement officials.

- *Additional Hate Crime Investigators and Prosecutors.* The President announced that the Department of Justice would add "upwards of 50 FBI agents and federal prosecutors to enforce hate crime laws."[12] The White House announced that this increase would more than double the existing number of federal agents and prosecutors currently assigned to this work.

- *Improved Data on Hate Crimes.* In an effort to better gauge the magnitude of the hate crime problem in America, the President announced plans to add questions about hate violence to the well-established National Crime Victimization Survey (NCVS), an annual assessment of crime in America undertaken by the Justice Department's Bureau of Justice Statistics.

- *Educating Youth About Hate Crimes.* The President announced that the Department of Justice and the Department of Education would jointly distribute a manual for educators on the causes of hate crimes, responses to prejudice and bigotry, and useful resources on the subject.[13] In addition, he announced plans for the development of a special Justice Department interactive hate crime web site for children.[14]

- *Housing-Related Hate Crimes.* The President and Department of Housing and Urban Development (HUD) Secretary Andrew Cuomo announced an initiative to provide authority for victims of housing-related hate violence to seek monetary remedies from perpetrators.[15]

- *Legislation to Expand Federal Hate Crime Investigative and Prosecutorial Authority.* Finally, the President announced his support for legislation that would expand authority for federal investigations and prosecutions in cases in which the bias violence occurs because of the victim's sexual orientation, gender, or disability.[16]

The Administration has entrusted the task of coordinating and overseeing all these initiatives to a national HCWG, composed primarily of officials from the Department of Justice, with other officials from the Education Department and HUD.

III. The 105th Congress

The 105th Congress compiled an undistinguished record of concern about bias-motivated criminal activity. While Congress approved significant budget increases for federal civil rights enforcement and approved an inclusive campus hate crime data collection initiative as part of the Higher Education Amendments of 1998,[17] it failed to act on legislation that would have facilitated federal investigations and prosecutions of violent bigotry. Prompted in part by the murder of James Byrd, Jr., in Jasper, Texas, on June 7, 1998, the House and the Senate Judiciary Committees held hearings on this measure, the Hate Crime Prevention Act (HCPA),[18] in early July. In the final days of the term, another tragic bias crime, the murder of University of Wyoming college student Matthew Shepard on October 12, again focused national attention on the problem of hate violence—and on the role of federal and state government officials in countering these crimes. Despite the energetic support of Administration officials, many members of Congress, and civil rights activists in the final, hectic days of the legislative session, Congress failed to enact the HCPA before adjournment.

A. Higher Education Act Amendments

The single substantive legislative achievement in confronting hate violence of the 105th Congress was a provision added to the Higher Education Act Amendments[19] to require that campus hate crimes be reported to the Department of Education. In the face of a number of unsettling incidents of bias-motivated violence, vandalism, intimidation, and harassment on college campuses—and abysmal compliance by campus police across the country with hate crime reporting requirements under either the Hate Crime Statistics Act of 1990 (HCSA)[20] or the 1990 Campus Security Act[21]—Senator Robert Torricelli (D-NJ) and Representative Bob Franks (R-NJ) introduced identical legislation designed to spark improved reporting.[22] The legislation expanded the types of crimes required to be reported and, for the first time, added the requirement that gender-based and disability-based crimes be included in the reporting requirements. Under the leadership of Senator Torricelli, this legislation was included in the Senate-passed Higher Education reauthorization legislation. The conference committee included a slightly narrowed version in the bill finally approved by Congress.[23]

B. The Hate Crimes Prevention Act (HCPA): Closing Gaps in Federal Law

Identified by advocates as the most important bias crime-related legislation of the 105th Congress, the HCPA would amend section 245 of Title 18 U.S.C.—one of the primary statutes used to combat racial and religious bias-motivated violence. The statute prohibits intentional interference, by force or threat of force, with enjoyment of a federal right or benefit (such as voting, going to school, or working) on the basis of the victim's race, color, religion, or national origin. Under the current law, enacted in 1968, the government must prove that the crime occurred because of a person's membership in a protected group—and because (not while) he/she was engaging in a federally protected activity. Justice Department officials have identified a number of significant racial violence cases in which federal prosecutions have been stymied by these unwieldy dual jurisdictional requirements.

The HCPA would amend 18 U.S.C. § 245 in two ways. First, the legislation would remove the overly restrictive obstacles to federal involvement by permitting prosecutions without having to prove that the victim was attacked because he/she was engaged in a federally protected activity. Second, it would provide expanded authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's actual or perceived sexual orientation,[24] gender,[25] or disability.[26]

Under the leadership of Senators Edward Kennedy (D-MA), Arlen Specter (R-PA), and Ron Wyden (D-OR), and Representatives Charles Schumer (D-NY) and Bill McCollum (R-FL), the HCPA was introduced immediately after the White

House Conference on Hate Crimes in November 1997. While members of Congress and a broad coalition of law enforcement organizations, civil rights groups, and state and local municipal associations continued to built support for the measure in the months that followed, the brutal murder of James Byrd, Jr., in Jasper, Texas, in early June provided a tragic demonstration of the problem of hate violence—and energized members and advocates to act on behalf of the HCPA. At hearings scheduled shortly after this murder, the House[27] and Senate Judiciary Committees[28] heard testimony from a variety of government, law enforcement, and academic witnesses.

Justice Department officials and other advocates tried to meet federalism concerns by attempting to distinguish between the vast majority of bias crimes that are effectively addressed at the state and local level and those that may warrant federal assistance or involvement—frequently those in which local authorities are either unable or unwilling to investigate and prosecute.[29] In this regard, they asserted that enactment of the HCPA would not significantly alter the existing federal-state prosecutorial responsibilities.

For example, in those states without hate crime statutes, and in others with limited coverage, local prosecutors are simply not able to pursue bias crime convictions. Currently, only 21 states include sexual orientation-based crimes in their hate crimes statutes, 20 states include coverage of gender-based crimes, and 22 states include coverage for disability-based crimes. (See Figure 1, charting state hate crimes statutory provisions.) Other cases that could clearly warrant federal involvement include those in which local law enforcement officials refuse to act because, for example, the rapist or the batterer in a small town is a friend or relative of the Police Chief, the District Attorney, or the Mayor.

As drafted, the HCPA contains a number of significant limitations on prosecutorial discretion. First, the bill's requirement of actual injury, or, in the case of crimes involving "the use of fire, a firearm, or any explosive device, an attempt to cause bodily injury," limits the federal government's jurisdiction to the most serious crimes of violence against individuals—not property crimes.

Second, for the proposed new categories—gender, sexual orientation, and disability—federal prosecutors would have to prove an interstate commerce connection with the crime—similar to the constitutional basis relied upon for the Church Arson Prevention Act passed unanimously by Congress in 1997.

Third, the HCPA retains the current certification requirement under 18 U.S.C. § 245. This institutional limitation on prosecutions requires the Attorney General, or her/his designee, to certify in writing that an individual prosecution "is in the public interest and necessary to secure substantial justice."

Justice Department officials have historically been extremely selective in choosing which cases to prosecute under the federal criminal civil rights statutes. For example, in 1996, a year in which the FBI's HCSA report documented 8,759 hate crimes reported by 11,355 police agencies, the Justice Department brought only 38 racial violence cases under all federal criminal civil rights statutes combined—and only 8 cases under 18 U.S.C. § 245. In fact, since its enactment in 1968, there have never been more than ten indictments in any year under 18 U.S.C. § 245. Yet, while the number of federal prosecutions for racial violence is small, these efforts provide an essential supplement to state and local criminal prosecutions. The importance of these few cases cannot be overstated. For example, a number of the racial violence cases involve prosecutions of members of the Ku Klux Klan and other organized hate groups. These cases—6 in 1998, involving 13 defendants, and 7 more cases in the last two years, involving 16 defendants—help to demonstrate the federal government's resolve to combat organized bigotry.[30]

Supporters of the HCPA know well that new federal criminal civil rights jurisdiction to address crimes directed at individuals because of their gender, sexual orientation, or disability will not result in the elimination of these crimes. But the possibility of federal prosecutions in select cases, the impact of FBI investigations in others, and expanded partnership arrangements with state and local investigators in still other cases should prompt more effective state and local prosecutions of these crimes.

Figure 1. State Hate Crimes Statutory Provisions

	AL	AK	AZ	AR	CA	CO	CT	DC	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
Bias-Motivated Violence and Intimidation	✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓
Civil Action				✓	✓	✓	✓	✓		✓			✓	✓		✓			✓			✓	✓			✓
Criminal Penalty	✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓
Race, Religion[1], Ethnicity	✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓
Sexual Orientation			✓		✓		✓	✓	✓	✓				✓		✓			✓	✓		✓		✓		
Gender		✓	✓		✓			✓						✓		✓			✓	✓			✓	✓	✓	
Other[2]	✓	✓	✓		✓			✓	✓					✓		✓			✓	✓		✓		✓		
Institutional Vandalism	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓
Data Collection[3]			✓		✓		✓	✓		✓			✓	✓		✓		✓	✓	✓	✓	✓		✓		
Training for Law Enforcement Personnel[4]			✓		✓									✓		✓		✓	✓			✓		✓		

	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
Bias-Motivated Violence and Intimidation	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	
Civil Action		✓	✓		✓					✓	✓	✓	✓	✓		✓	✓			✓	✓	✓		✓	
Criminal Penalty	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	
Race, Religion[1], Ethnicity	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓		✓	✓			✓	✓	✓	✓	✓	
Sexual Orientation		✓	✓	✓	✓							✓		✓						✓		✓		✓	
Gender		✓		✓	✓		✓		✓					✓						✓		✓	✓		
Other[2]		✓	✓	✓	✓		✓				✓			✓						✓		✓	✓	✓	
Institutional Vandalism	✓		✓		✓	✓		✓		✓	✓	✓	✓	✓	✓		✓	✓			✓	✓		✓	
Data Collection[3]		✓	✓		✓						✓	✓	✓	✓				✓			✓	✓			
Training for Law Enforcement Personnel[4]												✓		✓								✓			

1 The following states also have statutes criminalizing interference with religious worship: CA, DC, FL, ID, MD, MA, MI, MN, MS, MO, NV, NM, NY, NC, OK, RI, SC, SD, TN, VA, WV.

2 "Other" includes mental and physical disability or handicap (AL, AK, AZ, CA, DC, DE, IL, IA, LA, ME, MA, MN, NE, NV, NH, NJ, NY, OK, RI, VT, WA, WI), political affiliation (DC, IA, LA, WV), and age (DC, IA, LA, VT).

3 States with data collection statutes which include sexual orientation are AZ, CA, CT, DC, FL, IL, IA, MD, MN, NV, OR, and WA; those which include gender are AZ, DC, IL, IA, MN, WA.

4 Some other states have regulations mandating such training.

5 New York State law provides penalty enhancement limited to the crime of aggravated harassment.

6 The Texas statute refers to victims selected "because of the defendant's bias or prejudice against a person or group."

7 The Utah statute ties penalties for hate crimes to violations of the victim's constitutional or civil rights.

Federal Criminal Civil Rights Statutes[11]

State and local law enforcement authorities play the primary role in the prosecution of bias-motivated violence. Current federal law contains significant gaps and limitations, reaching only racially motivated violence that is intended to interfere with the victim's federal rights or participation in a federally protected activity. However, the federal government does play a critical role in supplementing state and local prosecutions in appropriate circumstances.

42 U.S.C. § 3631, the criminal portion of the Fair Housing Act of 1968, prohibits housing-related violence on the basis of race, color, religion, sex, handicap, familial status, or national origin. The violence usually prosecuted under this section includes cross burnings, firebombings, arson, gunshots, rock-throwing, and vandalism. The statute reaches all persons involved in any housing-related activity—sellers, buyers, landlords, tenants, and real estate agents.

18 U.S.C. § 245 is the primary criminal civil rights statute for racial violence cases that do not involve housing. As enacted in 1968, section 245 prohibits the use of force or threats of force against individuals because of their race, color, religion, or national origin, and because those individuals are engaged in certain specified activities. Section 245 protects against race-based interference in the right to enroll in public school or college; the right to participate in and enjoy any benefit, service, or program administered by a state; employment by any private employer or state or local agency; travel in or use of a facility of interstate commerce; and enjoyment of goods or services of any place of public accommodation.

18 U.S.C. § 247 criminalizes attacks on religious property and obstructions of persons who are enjoying the free exercise of their religious beliefs. This statute, originally enacted in 1988 and amended by the Church Arson Prevention Act of 1996, covers racially motivated church burnings and bombings, as well as acts of desecration motivated by religious animus when the defendant has traveled in interstate commerce or has used a facility or instrumentality of interstate commerce.

18 U.S.C. § 241 broadly prohibits a conspiracy to injure or threaten "any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

IV. Federal Initiatives to Respond to Hate Violence

A. Bigotry Burning: A Welcome Decrease in Arson at Houses of Worship

In late 1995 and early 1996, law enforcement investigators and civil rights leaders began to monitor a notable increase in the number of reported attacks on houses of worship—especially against African American churches in the South. Though slow to recognize the national scope of the problem, over time the Administration developed a well-coordinated interagency campaign focusing on public education, prevention, enforcement, and rebuilding.

Complementing bipartisan congressional action (discussed below), federal agencies have responded with unusually integrated and coordinated action:

- In testimony before the Senate Judiciary Committee, Justice and Treasury Department officials labeled the response to the attacks "one of the

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largest federal criminal investigations of any kind, one of the largest arson investigations in history, and the largest current civil rights investigation."[32]

- The Justice Department's Community Relations Service has played a central role in coordinating prevention activities and addressing community tensions in the aftermath of these attacks.[33]

- The Federal Emergency Management Agency (FEMA) developed and distributed arson prevention materials and has provided arson training grants to affected states.

- The Bureau of Alcohol, Tobacco, and Firearms (BATF) prepared a *Church Threat Assessment Guide* to help houses of worship, especially rural ones, take steps to protect themselves from criminal arsonists and vandals.

- The Department of Housing and Urban Development (HUD) has administered a $10 million Federal Loan Guarantee Fund and has provided other technical rebuilding assistance.

This interagency response has been complemented by extraordinary outreach and cooperative efforts by private civil rights and religious organizations—ranging from offering financial and legal assistance to providing volunteers to help rebuild.[34] Relationships established and cooperative efforts undertaken on this issue have had a very positive effect on intergroup relations nationally.

In June 1996, President Clinton established the National Church Arson Task Force (NCATF), composed of FBI and BATF investigators and Justice Department prosecutors. The Task Force has benefitted greatly from effective leadership from the Justice Department's Civil Rights Division and from the newly established FBI Hate Crime Unit. Through the use of both a central clearinghouse in databases of the FBI and BATF to track leads and extensive efforts to coordinate information sharing and investigations with state and local law enforcement officials, the Task Force has achieved outstanding results—and clearly made a difference. On October 22, 1998, officials from the Justice Department and Treasury Department released the second-year National Church Arson Task Force report.[35] The report documented a decrease in the number of reported attacks against houses of worship, attributing the decline to increased law enforcement vigilance, well-publicized arrests and prosecutions, and expanded prevention efforts.

According to the report, from January 1, 1995, to September 8, 1998, the Task Force opened 670 investigations of suspicious fires, bombings, and attempted bombings, including 225 incidents involving predominantly African American houses of worship—163 in the South. Federal, state, and local law enforcement officials have arrested 308 persons in connection with 230 of these incidents—254 whites, 46 African Americans, and 8 Hispanics. Of the arrested persons, 119 have been juveniles under the age of 18. Of the 106 suspects arrested for attacks against predominantly African American churches, 68 are white, 37 are African Americans, and 1 is Hispanic. Of the 197 suspects arrests for attacks against houses of worship that are not predominantly African American, 181 are white, 9 are African American, and 7 are Hispanics.

Federal and state prosecutors obtained convictions of 235 defendants in connection with 173 incidents—including the first convictions under the Church Arson Prevention Act. The report indicated that of the 61 defendants convicted of federal charges, 29 were convicted of hate crimes arising from 24 incidents. In addition, of the 171 defendants convicted of state criminal charges, 25 were convicted of 13 incidents determined to be hate crimes. Overall, the arrest rate in Task Force cases—34%—is more than double the arson arrest rate nationwide. Beyond arrests and convictions, the report documented extensive public and private efforts to assist communities in rebuilding trust and strengthening intergroup relations.[36]

From the beginning, a critical question facing law enforcement officials and private watchdog groups, like the Anti-Defamation League (ADL), was whether these attacks were part of a national conspiracy of domestic terrorism directed by organized hate groups. To date, investigators have determined that at least two of the fires were directly linked to Ku Klux Klan members.[37] The overwhelming consensus view, however, is that the vast majority of the fires have not been part of a campaign driven by elements of the organized hate movement. This finding, of course, leads to a disturbing conclusion: individuals, in different parts of the country, at different times, often inspired by hate, were acting independently to commit these crimes.

B. The Hate Crime Statistics Act (HCSA)[38] and Seven Years of HCSA Data: Progress and Significant Promise

Though a number of private groups[39] and state law enforcement agencies track incidents of hate violence, the HCSA now provides the best national picture of the magnitude of the hate violence problem in America—though still clearly incomplete. Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. In the Violent Crime Control and Law Enforcement Act of 1994,[40] Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."[41]

The FBI documented a total of 4,558 hate crimes in 1991, reported from almost 2,800 police departments in 32 states.[42] The Bureau's 1992 data documented 7,466 hate crime incidents reported from more than twice as many agencies, 6,181—representing 42 states and the District of Columbia.[43] For 1993, the FBI reported 7,587 hate crimes from 6,865 agencies in 47 states and the District of Columbia.[44] The FBI's 1994 statistics documented 5,932 hate crimes, reported by 7,356 law enforcement agencies across the country.[45] The FBI's 1995 HCSA report documented 7,947 crimes reported by 9,584 agencies.[46] The FBI's 1996 HCSA report documented 8,759 hate crimes reported to the FBI by 11,355 agencies.[47]

The Bureau's 1997 HCSA summary report,[48] released in November 1998, documented a slight decrease in both the number of reported hate crimes, 8,049, and the number of participating law enforcement agencies, 11,211. Though activists and analysts were pleased to note the slight decrease in the number of reported hate crimes, it is too early to tell whether this drop reflects the general declining crime trends, and effective programmatic and law enforcement response—or, instead, is attributable to the accompanying unwelcome decrease in the number of HCSA participating agencies.[49]

Clearly these hate crime numbers do not speak for themselves. Behind each and every one of these statistics is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or ethnicity. While we will know much more about the validity of the FBI's 1997 data when the Bureau releases its annual jurisdiction-by-jurisdiction breakdown in the next few months,[50] the summary data released in November provides useful information:

- The FBI report indicated that about 59% of the reported hate crimes were race-based, with 17% committed against individuals on the basis of their religion, 10% on the basis of ethnicity, and almost 14% against gay men and lesbians.

- Overall, approximately 39% of the reported crimes were anti-black, 12% of the crimes were anti-white, 4.5% of the crimes were anti-Asian, and 6.5% anti-Hispanic.

- The 1,087 crimes against Jews and Jewish institutions comprised more than 13% of the total—and 79% of the reported hate crimes based on religion.

- Only 70% of the 16,000 law enforcement agencies that regularly report crime data to the FBI are reporting hate crime data to the Bureau. Moreover, as in years past, the vast majority of participating agencies affirmatively reported that *no hate crimes were committed in their jurisdictions*. Of the 11,211 departments participating in the 1997 HCSA data collection effort, only 1,732 (15%) reported even one hate crime. (For additional details, see the comparison of FBI hate crime statistics from 1991–97 in Figures 2 and 3.)

Figure 2.
Comparison of FBI Hate Crime Statistics 1991–1997*

	1991	1992	1993	1994	1995	1996	1997
Participating Agencies	**2,771**	**6,181**	**6,865**	**7,356**	**9,584**	**11,355**	**11,211**
Total Hate Crime Incidents Reported	4,558	7,466	7,587	5,932	7,947	8,759	8,049
Number of States, including D.C.	**32**	**42**	**47**	**44**	**46**	**50**	**49**
Percentage of U.S. Population Agencies Represent	N/A	51	58	58	75	84	85

Offenders' Reported Motivations in Percentages of Offenses*

	1991	1992	1993	1994	1995	1996	1997
Racial Bias	62.3	60.7	62.4	59.8	60.7	61.6	58.5
Anti-Black	35.5	34.7	37.1	36.6	37.6	41.9	38.8
Anti-White	18.7	20.3	19.4	17.0	15.4	12.6	12.3
Religious Bias	19.3	17.5	17.1	17.9	16.1	15.9	17.2
Anti-Semitic	16.7	15.4	15.1	15.1	13.3	12.7	13.5
Anti-Semitic as Percentage of Religious Bias	86.4	87.5	88.1	86.2	82.9	79.2	78.5
Ethnicity	9.5	10.1	9.2	10.8	10.2	10.7	10.4
Sexual Orientation	8.9	11.6	11.3	11.5	12.8	11.6	13.7

* Charts created by the Anti-Defamation League Washington Office from data collected by the FBI.

Figure 3. State by State Comparison, HCSA Reporting 1991–1997*

A=Number of agencies participating in HCSA for each state, B=Number of incidents reported by agencies in the state, **=Did not report

	1991		1992		1993		1994		1995		1996		1997	
STATE	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**
Alabama	**	**	4	4	4	5	**	**	**	**	289	0	282	0
Alaska	**	**	**	**	1	24	1	9	1	8	1	9	1	10
Arizona	1	48	90	172	89	208	82	205	87	220	81	250	85	330
Arkansas	169	10	183	37	187	13	189	9	190	7	191	1	194	0
California	2	5	7	75	11	364	13	354	744	1751	718	2052	720	1831
Colorado	194	128	197	258	199	178	231	173	228	149	230	133	232	113
Connecticut	29	69	23	62	39	117	89	68	94	87	98	114	59	113
Delaware	58	29	57	47	49	33	51	42	51	45	50	67	54	58
District of Columbia	**	**	1	14	1	10	1	2	1	4	1	16	1	6
Florida	**	**	374	334	374	239	370	214	411	164	394	187	580	93
Georgia	2	23	4	66	4	75	3	51	3	49	2	28	5	45
Hawaii	**	**	**	**	**	**	**	**	**	**	**	**	**	**
Idaho	98	33	115	54	110	70	117	79	116	114	112	72	119	46
Illinois	26	133	620	241	224	724	19	239	1	146	114	333	96	339
Indiana	1	0	5	19	52	82	89	32	164	35	179	36	139	62
Iowa	201	89	190	36	196	39	226	61	232	29	231	43	230	55
Kansas	3	6	2	3	1	0	**	**	**	**	1	28	1	55
Kentucky	1	0	2	5	3	13	5	4	513	81	527	109	213	48
Louisiana	6	0	10	13	58	23	92	9	146	7	140	6	147	4
Maine	**	**	9	19	6	32	5	7	130	75	131	58	131	57
Maryland	156	431	156	484	153	404	150	325	148	353	148	387	148	321
Massachusetts	30	200	158	424	135	343	**	**	202	333	405	454	359	441
Michigan	**	**	454	122	555	247	518	252	480	405	485	485	465	461
Minnesota	42	225	69	411	66	377	**	**	66	285	307	268	312	214
Mississippi	4	1	1	0	17	0	53	6	51	6	129	3	75	0
Missouri	18	136	17	158	81	168	155	139	157	135	230	150	194	157
Montana	**	**	**	**	18	21	2	0	6	11	95	10	95	15
Nebraska	**	**	**	**	**	**	**	**	**	**	10	3	10	3
Nevada	1	16	3	23	9	12	5	16	35	68	4	44	34	45
New Hampshire	**	**	**	**	1	0	2	3	2	24	2	1	**	**
New Jersey	271	895	291	1114	317	1101	559	895	568	768	568	139	567	694
New Mexico	1	0	**	**	13	4	57	4	70	24	70	44	58	24
New York	773	943	569	1112	571	934	567	911	520	845	499	903	502	853
North Carolina	**	**	1	1	6	10	7	7	59	52	83	34	445	42
North Dakota	**	**	1	1	91	1	82	5	74	3	101	1	84	2
Ohio	30	80	26	105	128	260	266	357	321	267	405	234	304	265
Oklahoma	7	99	9	147	9	60	4	20	7	37	293	83	300	41
Oregon	39	296	279	376	279	237	206	177	243	152	174	172	171	105
Pennsylvania	50	277	944	432	1036	391	1044	278	1134	282	1137	205	1108	168
Rhode Island	**	**	44	48	45	62	45	37	45	46	46	40	45	43
South Carolina	**	**	4	4	295	27	302	30	293	26	340	42	316	71
South Dakota	**	**	**	**	3	4	4	1	38	5	32	3	42	34
Tennessee	2	1	2	4	56	2	113	20	104	25	191	33	167	46
Texas	28	95	870	486	879	418	895	364	914	326	915	350	924	333
Utah	**	**	9	12	121	45	123	93	116	107	124	59	124	49
Vermont	**	**	**	**	1	1	18	12	19	10	3	4	20	3
Virginia	19	53	24	102	21	100	160	95	175	51	409	92	409	105
Washington	206	196	207	374	207	457	22	281	229	226	230	198	229	190
West Virginia	**	**	**	**	**	**	**	**	**	**	22	4	32	3
Wisconsin	303	41	145	67	161	19	150	40	337	45	338	43	345	50
Wyoming	**	**	5	0	49	10	60	6	59	19	70	4	38	6

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* Charts created by the ADL Washington Office from data collected by the FBI.

Despite an incomplete reporting record over the first seven years of the Act, the HCSA has proved to be a powerful mechanism to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation, or ethnicity. Importantly, the HCSA has also increased public awareness of the problem and sparked improvements in the local response of the criminal justice system to hate violence.[51] Studies have demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place.[52]

Police officials have come to appreciate the law enforcement and community benefits of tracking hate crime and responding to it in a priority fashion. Law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.[53] By compiling statistics and charting the geographic distribution of these crimes, police officials may be in a position to discern patterns and anticipate an increase in racial tensions in a given jurisdiction.

However, studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to the police.[54] In addition to cultural and language barriers, some immigrant victims, for example, fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police—especially if they were in trouble.[55] Gay and lesbian victims, facing hostility, discrimination, and, possibly, family pressures because of their sexual orientation, may also be reluctant to come forward to report these crimes.[56] These issues present a critical challenge for improving law enforcement response to hate violence. When police departments implement the HCSA in partnership with community-based groups, the effort should enhance police-community relations.[57]

C. Hate Crime Sentencing Enhancement Act (28 U.S.C. § 994)

Congress enacted a federal complement to state hate crime penalty-enhancement statutes in the 1994 crime bill.[58] This provision required the United States Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." This measure applies, *inter alia*, to attacks and vandalism that occur in national parks and on federal property.

In May 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes, as directed by Congress. This amendment took effect on November 1, 1995. According to information prepared for the White House Hate Crimes Conference, 27 cases received enhanced sentences in 1996.[59]

D. Violence Against Women Act (VAWA) (42 U.S.C. § 13981)

Enacted as Title IV of the 1994 crime bill, VAWA addresses the problem of violent crime against women by providing authority for domestic violence and rape crisis centers and for education and training programs for law enforcement officials and prosecutors. The Act also included new federal criminal jurisdiction for interstate enforcement of restraining orders, to make acts of interstate domestic violence a federal offense, and to outlaw the possession of firearms and ammunition by persons who are subject to restraining orders.

Importantly, VAWA established a new federal civil remedy for victims of gender-based violent crimes that provides them with the right to sue perpetrators for compensatory and punitive damage awards, as well as for injunctive relief. Defendants in the first cases to be litigated under VAWA's civil rights remedy have challenged the remedy's constitutionality, claiming that Congress lacked authority to enact the statute.[60]

E. The Church Arson Prevention Act (CAPA)

This measure, sponsored by then-Senator Lauch Faircloth (R-NC) and Senator Edward Kennedy (D-MA), and, in the House by Representatives Henry Hyde (R-IL) and John Conyers (D-MI), was originally designed solely to facilitate federal investigations and prosecutions of church arson by amending 18 U.S.C. § 247, a statute enacted by Congress in 1988 to provide federal jurisdiction for religious vandalism cases in which the destruction exceeds $10,000. Hearings were held on both the impact of these crimes and the appropriate response of government.[61] Federal prosecutors testified that the statute's restrictive interstate commerce requirement and its relatively significant damages threshold had been obstacles to federal prosecutions.

Following the hearings, Congress found that "[t]he incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominately African-American congregations."[62] Legislators appropriately recognized that the nation's response to the rash of arsons should be more ambitious and comprehensive than mere efforts to ensure swift and sure punishment for the perpetrators.

In a welcome, if very rare, example of bipartisanship, both the House and the Senate unanimously approved legislation, the Church Arson Prevention Act,[63] which expanded federal criminal jurisdiction to investigate and prosecute attacks against houses of worship, increased the penalties for these crimes, and authorized additional FBI and BATF investigators, and Justice Department prosecutors and community conciliators.[64]

V. State Hate Crime Statutes: A Message to Victims and Perpetrators

Every state should enact a penalty-enhancement hate crime statute. At present, 49 states and the District of Columbia have enacted some type of statute addressing hate violence, and 40 states and the District of Columbia have enacted hate crime penalty enhancement laws.[65]

The intent of penalty-enhancement hate crime laws is not only to reassure targeted groups by imposing serious punishment on hate crime perpetrators, but also to deter these crimes by demonstrating that they will be dealt with in a serious manner. Under these laws, no one is punished merely for bigoted thoughts, ideology, or speech. But when prejudice prompts an individual to act on these beliefs and engage in criminal conduct, a prosecutor may seek a more severe sentence, but must prove, beyond reasonable doubt, that the victim was intentionally selected because of his/her personal characteristics.

In *Wisconsin v. Mitchell*,[66] the U.S. Supreme Court unanimously upheld the constitutionality of the Wisconsin penalty-enhancement statute—effectively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of race, religion, sexual orientation, gender, or ethnicity.

While bigotry cannot be outlawed, hate crime statutes demonstrate an important commitment to confront criminal activity motivated by prejudice. In conjunction with comprehensive implementation of the HCSA, stiff penalties for hate crime perpetrators sends the clear message that hate violence is a law enforcement priority and that each hate crime—and each hate crime victim—is important.

VI. Federal Hate Crime Awareness and Training Initiatives: A 1999 Status Report

A. Justice Department Programs and Initiatives

1. The Federal Bureau of Investigation/Hate Crime Statistics Act (HCSA)

- The FBI has been receptive to requests for HCSA training for state and local law enforcement officials. As of September 1998, the FBI had held more than 126 hate crime training conferences across the country, training nearly 7,700 law enforcement personnel from more than 2,600 agencies nationwide. ADL and other groups with expertise in analyzing and responding to hate violence have participated in a number of these training seminars for state and local law enforcement authorities on how to identify, report, and respond to hate crimes.

- The Bureau updated both its *Hate Crime Data Collection Guidelines* and its excellent *Training Guide for Hate Crime Data Collection* in 1996. Responding to the 1994 congressional mandate to collect data on disability-based crimes, the Bureau has recently developed and distributed training materials to help officials identify and respond to these hate crimes as well.

- In 1996, for the first time, the FBI incorporated a HCSA summary report within its annual *Crime in the United States (CIUS)* report. *CIUS*, essentially the bible of crime statistics, is an impressive, 400-page compendium of jurisdiction-by-jurisdiction crime statistics, charts, and graphs. *CIUS* is a primary resource for criminologists, policymakers, and analysts. Inclusion in *CIUS* encourages researchers and criminologists to study hate violence, helps place it on the agenda for criminal justice and crime prevention conferences, and sends a signal to law enforcement officials that the HCSA is a permanent, integral part of the FBI's comprehensive data collection programs.

- In 1997, the FBI divided its Civil Rights Unit into a Color of Law Unit to investigate official misconduct and police brutality, and a Hate Crime Unit to investigate federal criminal civil rights violations. The separate Hate Crime Unit provides a useful focal point for training and outreach on a range of FBI hate crime issues.

2. Federal Hate Crime Training and Outreach Initiatives

- Under the leadership of Justice Department officials in the Community Relations Service, Office of Justice Programs (including the Office of Juvenile Justice Delinquency Prevention, Office for Victims of Crime, Bureau of Justice Statistics, and Bureau of Justice Assistance), the Office of Community Oriented Policing Services (COPS), and the Department's Civil Rights Division, four versions of the hate crime training curriculum for law enforcement officials announced at the White House Conference on Hate Crime have now been developed.[67] These excellent and inclusive curricula, developed in partnership with the International Association of Directors of Law Enforcement Standards and Training, the National Association of Attorneys General, and the Treasury Department, build on earlier hate crime training resources developed by, among others, the FBI, the Treasury Department's Federal Law Enforcement Training Center (FLETC), the Massachusetts-based Educational Development Center, and the Office of the Massachusetts Attorney General. The curricula were presented at three regional train-the-trainers conferences in September and October 1998. Nearly 400 law enforcement officials, prosecutors, and representatives of civil rights and community-based organizations participated in the training sessions. Training teams made up of participants from those sessions are now promoting other regional and state training sessions.

- At the direction of Attorney General Janet Reno, many U.S. Attorneys have established or assisted in strengthening Hate Crime Working Groups (HCWGs), composed of state and local police and sheriffs, FBI agents, prosecutors, and representatives from civil rights groups and community-based organizations. On February 18, 1998, the Justice Department hosted a conference for representatives from each U.S. Attorney's office to discuss strategies for establishing the HCWGs, enforcement priorities, and available national resources.

3. The Community Relations Service (CRS)

CRS is the only federal agency that exists primarily to assist communities in addressing intergroup disputes. On many occasions since the establishment of CRS by the 1964 Civil Rights Act, CRS professionals, working with police officials and civil rights organizations, have acted to defuse community tensions and prevent disorders that could have escalated into riots. For example, CRS professionals have frequently provided technical assistance to law enforcement officials and community groups facing the impact of a Klan rally or a demonstration by organized hate groups.

- CRS has also played a leading role in the implementation of the HCSA data collection effort. CRS professionals have participated in HCSA training sessions for hundreds of law enforcement officials from dozens of police agencies across the country.

- CRS mediators and conciliators have also played an essential role in addressing community tensions in the aftermath of attacks against houses of worship—and have played a coordinating role in the development and implementation of the Justice Department's new law enforcement training curricula.

- In 1998, CRS published a bulletin, *Hate Crime: The Violence of Intolerance.*

4. The Office for Victims of Crime (OVC)

- In 1992, at the direction of Congress, the Justice Department's Office for Victims of Crime (OVC) provided funds for the development of a training curriculum to improve the response of law enforcement and victim assistance professionals to victims of hate crimes. This excellent OVC training curriculum[68] also promotes coordinated action between law enforcement officials and victim assistance professionals in the investigation and prosecution of these crimes.

5. The Office of Juvenile Justice and Delinquency Prevention (OJJDP)

In 1992, Congress approved several new hate crime and prejudice-reduction initiatives as part of the four-year Juvenile Justice and Delinquency Prevention Act reauthorization. The Act included a requirement that each state's juvenile delinquency prevention plan include a component designed to combat hate crimes and a requirement that the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) conduct a national assessment of youths who commit hate crimes, their motives, their victims, and the penalties received for their crimes.

- In response, in 1993, OJJDP allocated funds for this national assessment. After a baffling, extended delay, OJJDP submitted an incomplete and disappointing report in July 1996[69] that failed to provide any insights into the magnitude of the problem, the characteristics of the offenders or victims, or the causes of juvenile hate violence. The report also failed to make recommendations for future study or future action.

- On the positive side, OJJDP also provided funds for the development of an excellent, wide-ranging curriculum, *Healing the Hate: A National Bias Crime Prevention Curriculum for Middle Schools*, which is appropriate for educational, institutional, and other settings to address prevention and treatment of hate crimes committed by juveniles.

6. The Bureau of Justice Statistics (BJS)

- Under a grant funded by BJS, scholars and researchers from the Center for Criminal Justice Policy Research at Northeastern University in Boston are now studying differences in reporting rates among law enforcement agencies, and identifying strategies for increasing and sustaining reporting participation by these state and local officials.

- In addition, as announced at the White House Conference on Hate Crime, BJS received funding in its FY1999 appropriation to develop and integrate questions about bias crime into its annual survey assessment of crime in America, the National Crime Victimization Survey (NCVS). The NCVS survey data, compiled through a national sampling of some 50,000 U.S. households, should complement the hard data collected by the FBI under the Hate Crime Statistics Act to provide a much more complete picture of hate violence across the country.[70]

7. The Bureau of Justice Assistance (BJA)

Under the leadership of its Director, Nancy Gist, BJA has emerged as the Justice Department's most active and innovative source for positive initiatives to address bias-motivated crime.

- In 1997, under a grant provided by BJA, the National Criminal Justice Association prepared a comprehensive report on federal, state, and local response to hate crimes. This useful report, *A Policymaker's Guide to Hate Crimes*, includes a review of relevant legal cases and law enforcement hate crime practices.

- BJA also provided funding for the International Association of Chiefs of Police (IACP) for its national Hate Crime Summit in June 1998.

- BJA identified "Law Enforcement Partnership to Address Hate Crimes" as one of its ten Concept Paper Topic Areas for FY1998. Under this program, BJA awarded four grants, ranging in amounts from $100,000 to $150,000, for innovative hate crime education, coordination, and outreach programs, to prosecutors and other law enforcement authorities, including the San Diego Police Department in partnership with the San Diego Regional Office of the Anti-Defamation League and the San Diego Hate Crimes Community Working Group.

- BJA is also funding an important new initiative to develop and provide training for prosecutors in responding to hate crimes. The National District Attorneys Association, through its research arm, the American Prosecutors Research Institute, is developing these training materials, best practices, and model protocols for effective response to bias crimes.

8. National Institute of Justice (NIJ)

- Under a 1995 grant provided by NIJ, the American Prosecutors Research Institute of the National District Attorneys Association conducted a best practices review of prosecutor protocols in handling bias-motivated cases. The objective of the initiative was to develop a hate crimes training guide for prosecutors.

9. The Office of Violence Against Women

Under the 1994 Violence Against Women Act (VAWA), "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." The Office oversees the implementation of the VAWA, including the establishment of domestic violence and rape crisis centers and education and training programs for law enforcement and prosecutors. The Office also tracks the incidence of the new VAWA criminal provisions.

10. The Office of Community Oriented Policing Services (COPS)

Hate violence can be addressed effectively through a combination of presence, prevention, and outreach to the community that is the hallmark of community policing.

- In 1998, the COPS Office provided essential funding for the IACP Hate Crime Summit and for the production and distribution of the Justice Department's excellent law enforcement hate crime training initiative. In addition, the COPS Office funded several bias crime-related initiatives under its $40 million Problem-Solving Partnership grant program.

B. The Department of Education

There is growing awareness of the need to complement tough laws and more vigorous enforcement—which can deter and redress violence motivated by bigotry—with education and training initiatives designed to reduce prejudice. The federal government has a central role to play in funding program development in this area and promoting awareness of initiatives that work.

In 1992, for the first time, Congress acted to incorporate anti-prejudice initiatives into the Elementary and Secondary Education Act (ESEA), the principal federal funding mechanism for public schools. Title IV of the Act, Safe and Drug-Free Schools and Communities, also included a specific hate crimes prevention initiative that promotes curriculum development and training and development for teachers and administrators on the cause, effects, and resolutions of hate crimes or hate-based conflicts. The enactment of these federal initiatives represents an important advance in efforts to institutionalize prejudice reduction as a component of violence prevention programming.

- In a significant step towards fulfillment of the promise of these measures, in July 1996, the Department of Education provided nearly $2 million in new grants to fund the development and implementation of "innovative, effective strategies for preventing and reducing the incidence of crimes and conflicts motivated by hate in localities directly affected by hate crimes." ADL's A WORLD OF DIFFERENCE Institute received one of the grants under this initiative to implement an anti-bias, anti-hate crime training program at four high schools and their feeder elementary and middle schools in three states: California, Nebraska, and New York.[71]
- Under the leadership of the Department's Office of Civil Rights, in association with the National Association of Attorneys General, the Department has provided excellent counsel and programming for schools in a new publication, *Protecting Students from Harassment and Hate Crimes: A Guide for Schools*. The Department should make this new guide available on its website and prepare and promote training materials on the issue.

C. The U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights has historically held useful field hearings and briefings on race relations and hate violence. The Commission held community forums on the suspicious fires at houses of worship in six Southern states in July 1996. Hosted by its State Advisory Committees, the Commission heard testimony from community and civic leaders, and federal, state, and local law enforcement officials.

D. The Department of the Treasury

As mentioned above, agents from the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (BATF) have provided essential investigative resources as part of the government's National Church Arson Task Force.

- Hate crime response experts from around the country have assisted in the development of an excellent model hate crime training curriculum for use by the Federal Law Enforcement Training Center (FLETC) for federal, state, and local police officials. The FLETC curriculum has been presented at 22 training seminars across the country to over 650 law enforcement training personnel and deserves much more attention and promotion.

E. The Department of Housing and Urban Development (HUD)

- In conjunction with the National Council of Churches and the Congress of National Black Churches, HUD has organized a series of information seminars at which HUD officials discuss its $10 million loan guarantee rebuilding fund, with architects, lawyers, and construction specialists available to offer specific assistance. In addition, representatives from the Justice Department, BATF, and FEMA have also been on hand to discuss enforcement and arson prevention activities. More than 100 houses of worship have received rebuilding assistance through HUD's National Rebuilding Initiative.

- In December 1997, HUD promulgated a proposed rule to expand civil penalties for Fair Housing Act violations. Under this new procedure, administrative law judges would be explicitly authorized to assess a separate civil penalty for multiple acts involving housing discrimination. This initiative, called "Make 'Em Pay," is designed to combat housing-related acts of hate violence by increasing the severity of the consequences for committing such a crime. To the disappointment of hate crime advocates, HUD officials had not yet promulgated the Final Rule implementing this initiative by the end of 1998.

- HUD officials are currently planning a national "Healing Neighborhoods" conference in an effort to increase the housing community's awareness of hate crime issues.

F. The Department of Defense

In recent years, factions of the Ku Klux Klan and other organized hate groups have attempted to infiltrate the armed forces and establish cells at military camps and bases. The dangers of extremism in the military were most dramatically revealed in December 1995, when two African Americans were murdered in Fayetteville, North Carolina, by two white soldiers stationed at nearby Fort Bragg who had been involved in neo-Nazi skinhead activities. In the wake of these murders, the Army established a Task Force on Extremist Activities, which conducted extensive interviews and surveys of thousands of soldiers and released its report in March 1996.[72] The report found minimal evidence of extremist activity in the Army. Yet, even if organized hate group members in the military are few in number (as they are in general society), the access they have to weapons, explosives, and training make them a potentially significant threat to society. In addition, the presence of haters and extremists in the military poses a threat to morale and good order in the ranks.

The House National Security Committee held hearings on the issue on June 25, 1996. In an important follow-up, Congress required each service branch to conduct "ongoing programs for human relations training for all members of the Armed Forces," and required the Defense Department to report to Congress the findings of an annual survey to measure the state of racial, ethnic, and gender discrimination in the military, as well as the extent of hate group activity.[73] Each of the service branches have subsequently revised and strengthened their policies against hate group activity and recruitment.[74]

G. National Institute of Mental Health (NIMH)

According to information distributed at the White House Conference on Hate Crimes, NIMH is funding the first large-scale study of the mental health consequences of hate crimes, focusing on anti-gay hate violence. The study is also designed to elicit information about the prevalence of anti-gay hate crimes and the rate at which these crimes are reported to the police.

VII. A Hate Violence Deterrence and Response Action Agenda for the 106th Congress and the Clinton Administration

A. Enforcement of Federal Hate Crime and Civil Rights Statutes

- *Congress should enact the Hate Crimes Prevention Act, legislation that would amend section 245 of Title 18 U.S.C. to remove the current overly restrictive obstacles to federal involvement in bias-motivated crimes and provide expanded authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's real or perceived sexual orientation, gender, or disability. Congress and the Clinton Administration should provide the resources necessary to develop training materials to successfully implement this expanded authority.* While states will continue to play the primary role in the prosecution of bias-motivated violence, the federal government must have jurisdiction for those limited cases in which a federal prosecution is warranted due to unique or compelling circumstances—such as insufficient state laws to match the gravity of the offense.

- *Working with U.S. Attorneys and private civil rights and community-based organizations, the Justice Department should promote the establishment or expansion of Hate Crime Working Groups (HCWGs) in every judicial district in the country.* These local HCWGs are well-equipped to make decisions on state and local hate crime initiatives, to improve hate crime data collection efforts and enforcement of existing laws, and to set priorities for the future.

- *Congress and the Clinton Administration should continue to make response to arson and other attacks against houses of worship a top investigative and prosecutorial priority.* Though the number and frequency of these attacks have declined, Justice Department prosecutors, agents from the FBI Hate Crime Unit, and other members of the National Church Arson Task Force should continue their effective, coordinated effort to investigate and prosecute these cases.

- *Justice Department officials should vigorously investigate and, where appropriate, prosecute threats of violence transmitted over the Internet.* In 1998, prosecutors obtained the first federal criminal civil rights conviction in a case involving an individual who had sent email messages threatening to "hunt down and kill" Asian American students at the University of California at Irvine.[75]

- *Congress and the Clinton Administration should provide the necessary resources to permit the newly established National Clinic Violence Task Force to undertake vigorous investigations of harassment, threats, and violence directed against clinics and abortion providers.*

- *The Justice Department and the FBI should provide expanded training on the federal hate crime sentencing enhancement provision.* While the 1994 federal sentencing enhancement provision has been used to step up penalties for crimes in which the victim was targeted because of race, religion, or national origin, it has, apparently, never been applied in cases involving victims targeted because of their sexual orientation, disability, or gender. Though federal criminal civil rights statutes do not currently include these categories, the use of this enhancement in other bias-motivated crimes should be encouraged.

- *HUD should finalize and implement its rule to expand civil penalties for Fair Housing Act violations.* This much-delayed "Make 'Em Pay" initiative, announced at the White House Conference on Hate Crimes, is designed to combat housing-related acts of hate violence by increasing the severity of the consequences for committing such a crime.

- *The Clinton Administration should follow through on the President's White House Conference on Hate Crime commitment to add "upwards of 50 FBI agents and federal prosecutors to enforce hate crime laws."*

- *The FBI should take steps to enhance civil rights and hate crime-related positions within the Bureau as career-advancing posts.*

B. Improved Data on Hate Crimes

- *Congress and the Clinton Administration should promote comprehensive implementation of the Hate Crime Statistics Act (HCSA) by state and local enforcement officials.* The Justice Department's Bureau of Justice Statistics has funded a necessary study on the differences in HCSA reporting rates among law enforcement agencies. The federal government should use its full range of resources to encourage comprehensive participation in the national data collection initiative.

- *The Justice Department should make participation in the HCSA program a prerequisite for receiving money through either the Office of Community Oriented Policing Services (COPS) or its Office of Justice Programs (OJP).* Congress and the Clinton Administration should require that new officers hired under the COPS initiative receive training in how to identify, report, and respond to hate violence. Congress and the Administration should make the receipt of OJP technical assistance grants dependent on participation in the HCSA data collection effort.

- *Congress and the Clinton Administration should provide additional incentives for HCSA implementation, including national recognition, matching grants for training, a network to promote replication of successful programs, and awards for exemplary departments.*[76] As efforts to implement the HCSA continue and expand, we will learn more about the perpetrators of these especially hurtful crimes—and how to prevent them.

- *Congress and the Clinton Administration should provide funds for a national assessment of juvenile hate violence, its causes, the prevalence of the problem in public schools, the characteristics of the offenders and victims, and successful intervention and diversion strategies.* The problem of bias-motivated gang activity and youth violence has not been effectively studied. Additional efforts are necessary to identify and promote effective programs, including community service and alternative sentencing options.

- *Congress should enact legislation to provide for a permanent mandate for the HCSA to underline the importance of the program and to ensure that hate crime data collection remains an integral part of the FBI Uniform Crime Reporting program.*[77] The readiness of the criminal justice system to address hate violence has significantly improved over the seven-year history of the HCSA. Providing a permanent mandate for the Act will help institutionalize these changes and expand upon these improvements.

C. Federal Hate Crime Research and Training Initiatives

- *Congress and the Clinton Administration should provide the necessary resources to widely promote and replicate the Justice Department's excellent new law enforcement training curricula.*

- *The Clinton Administration and Congress should take steps to ensure that the FBI receives sufficient funding to continue to respond to requests for hate crime training from law enforcement agencies across the country, as well as funding to continue its own training and education outreach efforts*

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for both new agents and in-service training for field agents at its Quantico training academy.

- *Congress and the Clinton Administration should ensure that the Treasury Department receives sufficient funding for its Federal Law Enforcement Training Center (FLETC) hate crime training course for federal, state, and local law enforcement officials.*

- *Congress and the Clinton Administration should support efforts to develop hate crime training initiatives for prosecutors and judges.* Building on successful and established hate crime training initiatives for police officers and executives, the next critical step is the development of model protocols, a model training guide, and an overall hate crime training curriculum for prosecutors.

- At this time of heightened concern about illegal immigration and significant increases in Immigration and Naturalization Service (INS) resources and Border Patrol personnel, *Congress and the Clinton Administration should evaluate existing INS training protocols and ensure that these federal law enforcement officials are well trained to interact with persons of all different backgrounds and to identify, report, and respond to hate violence in an appropriate manner.*

- *Congress and the Clinton Administration should provide resources to promote training for juvenile justice and victim assistance professionals.* Excellent curricula for these two groups have been developed in recent years, but additional resources are necessary to promote training sessions and the use of these curricula.

- At least two of the men indicted for the murder of James Byrd, Jr., were believed to have been members of white supremacist prison gangs during their previous incarcerations. *Congress and the Clinton Administration should fund research on racist prison gangs and develop initiatives to address inmate recruitment.*

- *Congress and the Clinton Administration should provide funding to study federal and state hate crime prosecutions, including the number of convictions, the perpetrators, the impact of incarceration, and the recidivism rate.*

D. The Justice Department's Community Relations Service (CRS)

- *Congress and the Administration should provide CRS with sufficient funding to fulfill its vital and unique violence prevention mandate.*

- *Congress should act to expand the mandate of CRS to include providing mediation and conciliation services on the basis of religion and sexual orientation.*[78] Limited by its authorizing statute (Title X of the Civil Rights Act of 1964) to respond only to conflicts based on race, color, and national origin, CRS has been unable to respond to well-documented evidence that a high incidence of hate-based crimes are committed against gays and lesbians and against individuals because of their religion.[79]

E. Education

The American Psychological Association (APA) in its landmark 1993 report[80] documented the role of prejudice and discrimination in fostering social conflict that can lead to violence. Educational resources are effective tools to alter attitudes and behaviors—which in turn can prevent and reduce acts of hatred and discrimination.[81]

- *The Department of Education should make information available regarding successful prejudice-reduction and hate crime prevention programs and resources.* Resources must be allocated to institute and replicate best practices and promising programs on prejudice awareness, juvenile diversion, conflict resolution, and multicultural education.[82]

- *Congress and the Clinton Administration should include anti-prejudice initiatives in the Elementary and Secondary Education Act when it is reauthorized in the 106th Congress.* In addition to hate crime prevention programs, the federal government should include citizenship education initiatives and programs to support teaching about the Bill of Rights within this important funding measure.

- *The Justice Department, the Department of Education, and other involved federal agencies should institutionalize and coordinate their response to prejudice-motivated violence—including gang violence—through programs and initiatives developed for schools and community youth violence prevention programs.*

- *In consultation with the Justice Department, the Department of Education should provide training and technical assistance to officials at colleges and universities to ensure comprehensive implementation of the new campus hate crime reporting requirements included in the Higher Education Act amendments by the 105th Congress.*

- *Congress and the Clinton Administration should support efforts to study hate on the Internet, analyzing the Internet's use for the dissemination of propaganda, evaluating the extent to which this propaganda is accessible to minors, and making appropriate recommendations for response, not regulation or censorship.*[81]

- *Congress and the Clinton Administration should help promote civility and acceptance of differences in our society.* The nation must directly confront the prejudice and intolerance that can lead to hate crimes—in our communities, in our houses of worship, in our schools, and, especially, in our homes.

F. Responding to Racism and Hate Crimes in the Armed Forces

- *The Department of Defense and all branches of the military should increase their efforts to collect information on extremist groups, provide anti-bias and prejudice awareness training for all recruits and military personnel, improve procedures for screening out racist recruits, and clarify and publicize existing prohibitions against active duty participation in hate group activity.*

- *Congress should hold oversight hearings on the Defense Department's implementation of initiatives on hate groups in the military enacted as part of the National Defense Authorization Act of 1997.*

- *Congress and the Clinton Administration should support legislation to amend the Uniform Code of Military Justice, which governs military conduct, to provide enhanced penalties for bias-motivated violence committed by members of the Armed Forces.*

G. Leadership from Political and Civic Leaders

- *Members of Congress and Clinton Administration officials should seek opportunities to speak out against bigotry, intolerance, and prejudice in our society.* It is difficult to overstate the importance of outspoken leadership in opposition to all forms of bigotry. Our civic leaders set the tone for national discourse and have an essential role in shaping attitudes.

- *Congress and the Clinton Administration should support a continuing mandate for the President's Initiative on Race.*

- *The Clinton Administration should publish the proceedings from the White House Conference on Hate Crimes—and make them available on the White House's website.*

- *Politicians and civic leaders should not engage in divisive appeals based on race, ethnicity, sexual orientation, or religion.*

VIII. Conclusion

The attempt to eliminate prejudice requires that Americans develop respect for differences and begin to establish dialogue across ethnic, cultural, and religious boundaries. While bigotry cannot be outlawed, effective response by public officials and law enforcement authorities to hate violence can make a difference in deterring and preventing these crimes.

The federal government has an essential leadership role to play in confronting criminal activity motivated by prejudice and in promoting prejudice reduction initiatives for schools and the community. Ultimately, the impact of all bias crime initiatives will be measured in the response of the criminal justice system to the individual act of hate violence. With a number of very fine hate crime training, prevention, and anti-bias education initiatives in existence—and others in development—Congress and the Clinton Administration must build on a history of bipartisan support for these measures and sustain their commitment to these important programs.

Selected Resources on Hate Violence Counteraction

1997 Audit of Anti-Semitic Incidents, Anti-Defamation League, January 1998 (annual report).

1997 Audit of Violence Against Asian Pacific Americans, National Asian Pacific American Legal Consortium, December 1998 (annual report).

Addressing Racial and Ethnic Tensions: Combating Hate Crimes in America's Cities, Anti-Defamation League and the United States Conference of Mayors, June 1992.

Anti-Gay Violence, Victimization & Defamation in 1993, National Gay & Lesbian Task Force, Washington, D.C., 1994.

Anti-Lesbian, Gay, Bisexual and Transgendered Violence in 1997, National Coalition of Anti-Violence Programs, 1998.

Bias Crime: American Law Enforcement and Legal Responses, University of Illinois at Chicago, 1993.

Bias Crimes: National Bias Crime Training for Law Enforcement and Victim Assistance Professionals, Education Development Center, Inc., Massachusetts Criminal Justice Training Council, and the Office for Victims of Crime, 1994.

Bias Crimes: A Theoretical & Practical Overview, Brian Levin, Stanford Law & Policy Review, Winter 1992–1993.

Bias Incident Data Collection: A Guide for Communities and Organizations, National Institute Against Prejudice & Violence, 1993.

Cause for Concern: Hate Crimes in America, Leadership Conference Education Fund and Leadership Conference on Civil Rights, 1997.

Combating Bigotry on Campus, Anti-Defamation League, 1989.

Combating Hate Crimes in America's Cities, The United States Conference of Mayors and the Anti-Defamation League, March 1996.

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CQ Researcher: "Are Longer Sentences for Hate Crimes Constitutional?" Congressional Quarterly Inc., January 8, 1993.

Danger: Extremism—The Major Vehicles and Voices on America's Far-Right Fringe, Anti-Defamation League, 1996.

Defending American Values: The Secretary of the Army's Task Force on Extremist Activities, Department of the Army, March 21, 1996.

Final Report of the Governor's Task Force on Violence and Extremism, State of Maryland, 1987.

First Year Report for the President, National Church Arson Task Force, June 1997.

Governor's Task Force on Bias-Related Violence, State of New York, 1988.

Hate/Bias Crime Training Curriculum, National Center for State & Local Law Enforcement Training, Federal Law Enforcement Training Center, Department of Treasury, 1994.

Hate Crime: An Overview, Congressional Research Service (CRS) Report for Congress, July 1993.

Hate Crime: Policies and Procedures for Law Enforcement Agencies, Anti-Defamation League, 1988.

Hate Crime: A Prosecutor's Guide, Richard A. Devine, Cook County State's Attorney, Chicago, 1998.

Hate Crime: A Training Video for Police Officers, Anti-Defamation League, 1990 (17-minute training video and 24-page discussion manual).

Hate Crime: The Violence of Intolerance, Department of Justice, Community Relations Service, 1998.

Hate Crime Data Collection Guidelines, Summary Reporting System, National Incident-Based Reporting System, Uniform Crime Reporting, U.S. Department of Justice/FBI, 1996.

Hate Crime Laws, Anti-Defamation League, 1998.

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Hate Crime Laws: Punishment Which Fits the Crime, Steven M. Freeman, New York University School of Law, Annual Survey of American Law, Volume, Issue 4, 1992/1993.

Hate Crime Statistics Act, Hearings, Senate Judiciary Committee, March 19, 1996.

Hate Crime Statistics Act, Hearings, Senate Judiciary Committee, June 28, 1994.

Hate Crime Statistics Act, Hearings, Senate Judiciary Subcommittee on the Constitution, August 5, 1992.

Hate Crime Training: Core Curriculum for Patrol Officers, Detectives, and Command Officers; Hate Crime Training: Curriculum for Detectives and Investigators; Hate Crime Training: Curriculum for Patrol and Responding Officers; and *Hate Crime Training: Curriculum for Command Officers*. Each of the four curricula was developed in a partnership between the International Association of Directors of Law Enforcement Standards and Training, the National Association of Attorneys General, the U.S. Department of Justice, and the U.S. Department of the Treasury.

Hate Crimes: Confronting Violence Against Lesbians and Gay Men, Gregory M. Herek and Kevin Berrill, Sage Publications, 1992.

Hate Crimes: Model Policy, accompanied by Concepts and Issues Paper, International Association of Chiefs of Police, August 1, 1991.

Hate Crimes: The Rising Tide of Bigotry and Bloodshed, Jack Levin and Jack McDevitt, Plenum Press, 1993.

Hate Crimes Law, Lu-In Wang, Clark Boardman Callaghan, 1994.

Hate Crimes Laws: A Comprehensive Guide, Anti-Defamation League, 1994.

Hate Crimes Prevention Act of 1998, Hearings, House Judiciary Committee, July 22, 1998.

Hate Crimes Prevention Act of 1998, Hearings, Senate Judiciary Committee, July 8, 1998.

Hate Crimes Sentencing Enhancement Act of 1992, Hearings, House Judiciary Subcommittee on Crime and Criminal Justice, July 29, 1992.

Hate Groups in America: A Record of Bigotry and Violence, Anti-Defamation League, 1988.

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In Pursuit of Justice, Organization of Chinese Americans/Anti-Asian Violence Task Force, 1992.

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National Bias Crimes Training for Law Enforcement and Victim Assistance Professionals, Educational Development Center, Inc and Massachusetts Criminal Justice Training Council, 1995.

On the Basis of Sex: Recognizing Gender-Based Bias Crime, Bennett Weisburd and Brian Levin, Stanford Law & Policy Review, Spring 1994.

One America in the 21st Century: Forging a New Future, The Advisory Board's Report to the President, President's Initiative on Race, September 30, 1998.

The Policy and Procedures for the Handling of Racial, Religious and Ethnic Incidents, Baltimore County Police Department, Baltimore, Maryland.

A Policymaker's Guide to Hate Crimes, Department of Justice, Bureau of Justice Assistance, 1997.

Preventing Youth Hate Crime: A Manual for Schools and Communities, Department of Education and Department of Justice, 1997.

A Prosecutor's Guide to Hate Crime, Jack O'Malley, Cook County State's Attorney, 1994.

Protecting Students from Harassment and Hate Crimes: A Guide for Schools, U.S. Department of Education and the National Association of Attorneys General, 1999.

Punishing Hate: Bias Crimes Under American Law, Frederick M. Lawrence, Harvard University Press, 1999.

Racial and Religious Violence: A Law Enforcement Guidebook, National Organization of Black Law Enforcement Executives (NOBLE), March 1986.

Racial and Religious Violence: A Model Law Enforcement Response, National Organization of Black Law Enforcement Executives (NOBLE), September 1985.

Report of the Commission Racism, Racial Violence and Religious Violence, New Jersey Department of Law and Public Safety, 1993.

The Response of the Criminal Justice System to Bias Crime: An Exploratory Review, Abt Associates, Inc., Finn and McNeil, Cambridge, Mass., 1987 (submitted to the National Institute of Justice).

The Role of Telecommunications in Hate Crimes, National Telecommunications and Information Administration, U.S. Department of Commerce, December 1993.

Second Year Report for the President, National Church Arson Task Force, October 1998.

Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice, National Institute Against Prejudice and Violence, May 1986; Supplement, 1988.

Symposium: Hate Speech After R.A.V.: *More Conflict Between Free Speech and Equality?*, 18 William Mitchell Law Review, Fall 1992.

Ten Ways to Fight Hate: A Community Response Guide to Hate Crime and Hate Groups, Southern Poverty Law Center/Klanwatch, 1994.

To Reauthorize the Hate Crime Statistics Act, Senate Report No. 104-269, Senate Judiciary Committee, May 13, 1996.

Training Guide for Hate Crime Data Collection, Summary Reporting System, National Incident-Based Reporting System, Uniform Crime Reporting, U.S. Department of Justice/FBI, 1996.

Violence Against Women as Bias Motivated Hate Crime: Defining the Issues, Center for Women Policy Studies, 1991.

Walk With Pride—Taking Steps to Address Anti-Asian Violence, Japanese American Citizens League, August 1991.

The following websites also include outstanding resources on hate crimes laws, anti-bias and prevention programs, and links to other related sites:

www.ADL.org [Anti-Defamation League]

www.civilrights.org [Leadership Conference on Civil Rights/Leadership Conference Education Fund]

www.usdoj.gov/kidspage [Department of Justice Anti-Bias Kidspage]

www.whitehouse.gov/Initiatives/OneAmerica/america.html [President Clinton's Race Initiative]

Endnotes

[1] Michael Lieberman has been the Washington Counsel for the Anti-Defamation League (ADL) since January 1989. He has written widely about the impact of hate crimes and was actively involved in efforts to secure the passage of the Hate Crime Statistics Act (HCSA). Mr. Lieberman has participated in seminars and workshops on response to violent bigotry. The author is indebted to his colleagues, Steven M. Freeman, ADL's Associate Civil Rights Director and Director of Legal Affairs, and David Rosenberg, Assistant Director of Legal Affairs, and two former colleagues, Debbie N. Kaminer and Michael A. Sandberg, for their many contributions to this article.

The Anti-Defamation League. Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, ADL has played a national leadership role in the development of innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups.

[2] A search of the White House website (*www.whitehouse.gov*) found over 100 documents that reference hate crime, with many more at the Race Initiative site, *www.whitehouse.gov/Initiatives/OneAmerica/america.html.*

[3] Attorney General Reno is especially deserving of high praise. Under her energetic leadership, working groups within the Department of Justice met regularly for months preceding the November 1997 White House Conference on Hate Crimes. In advance of the Conference, members of these working groups developed an ambitious and impressive series of initiatives.

[4] Executive Order 13050, 62 Federal Register 116 (June 13, 1997).

[5] "Promote a constructive national dialogue to confront and work through challenging issues that surround race. Increase the Nation's understanding of our recent history or race relations and the course our Nation is charting on issues of race relations and racial diversity. Bridge racial divides by encouraging leaders in communities throughout the Nation to develop and implement innovative approaches to calming racial tensions. Identify, develop, and implement solutions to problems in areas in which race has a substantial impact, such as education, economic opportunity, housing, health care, and the administration of justice."

[6] The Advisory Board's Report to the President, President's Initiative on Race, *One America in the 21st Century: Forging a New Future* (Sep. 30, 1998).

[7] In addition, the Race Initiative's website, *www.whitehouse.gov/Initiatives/OneAmerica/ america.html*, contains considerable information about the objectives of the Initiative, the Advisory Board's field hearings, and the Report's recommendations.

[8] Leadership Conference Education Fund and Leadership Conference on Civil Rights (LCCR), *Cause for Concern: Hate Crimes in America* (1997). The full text of this very comprehensive report—as well as a broad array of civil rights resources, information on hate crime laws and prevention strategies, and links to other relevant sites—is accessible at the LCCR's website: *www.civilrights.org*.

[9] President Clinton, Radio Address to the Nation (June 7, 1997). The President spoke movingly about the impact of hate violence:

> *Such hate crimes, committed solely because the victims have a different skin color or a different faith or are gays or lesbians, leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together. They are acts of violence against America itself. And even a small number of Americans who harbor and act upon hatred and intolerance can do enormous damage to our efforts to bind together our increasingly diverse society into one nation realizing its full promise.*

[10] *Id.*

[11] This partnership between community groups and law enforcement was modeled after the Washington, D.C., Bias Crime Task Force, established in February 1996 to fight hate crimes and increase public awareness about bias-motivated crime in the nation's capital. The Task Force was founded by ADL's Washington, D.C./ Maryland/ Virginia Regional Director David Friedman and Eric Holder, then U.S. Attorney for the District of Columbia.

[12] The White House, Office of the Press Secretary, *The White House Conference on Hate Crime* (Nov. 10, 1997).

[13] U.S. Department of Education and U.S. Department of Justice, *Preventing Youth Hate Crime: A Manual for Schools and Communities* (1997).

[14] The website is located at *www.usdoj.gov/kidspage*.

[15] This proposed rule was announced in 62 Federal Register 66,488 (Dec. 18, 1997). The "Make 'Em Pay" initiative also proposes to increase the available penalties payable by perpetrators of housing-related hate crimes. In addition, the proposed rule anticipates assistance by the Department of Housing and Urban Development (HUD) and the Department of Justice in efforts to bring actions to collect these penalties. HUD's delay in implementing this relatively straightforward proposal is puzzling; the Department should finalize this rulemaking process as soon as possible.

[16] Identical versions of the Hate Crime Prevention Act, S. 1529 and H.R. 3081, were introduced in the 105th Congress immediately after the November 1997 White House Conference.

[17] Public Law No. 105-244 (Oct. 7, 1998).

[18] S. 1529, introduced by Senators Edward Kennedy (D-MA), Arlen Specter (R-PA), and Ron Wyden (D-OR), and H.R. 3081, introduced by Representatives Charles Schumer (D-NY) and Bill McCollum (R-FL).

[19] Public Law No. 105-244 (Oct. 7, 1998).

[20] 28 U.S.C. § 534.

[21] Public Law No. 101-542 (Nov. 8, 1990). The Act required colleges and universities to annually report crime statistics, including hate crimes, in an effort to measure campus crime and increase security awareness.

[22] S. 1493 and H.R. 3043, respectively.

[23] The provision tracks the language of the Hate Crime Sentencing Enhancement Act (HCSEA), approved as part of the 1994 crime bill: "and other crimes involving bodily injury to any person in which the victim is intentionally selected because of the actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability of the victim . . . ."

[24] Despite the fact that a significant number of hate crimes are committed against gays and lesbians, hate crime statutes in only 21 states now include crimes directed at an individual because of his/her sexual orientation. Currently, the Justice Department has limited authority to seek enhanced penalties associated with hate violence directed at gay men and lesbians in bias-motivated federal crimes, since sexual orientation is one of the categories included in the Hate Crime Sentencing Enhancement Act, 28 U.S.C. § 994. This authority, however, has apparently never been used.

[25] In the past five years, as states have realized that it is difficult to distinguish race-based and religion-based crimes from gender-based crimes, the trend in a number of state legislatures has been to include gender in hate crimes legislation. In 1990, only 7 of the statutes in the 31 states which had hate crime statutes included gender. Today, 20 of the 40 states with penalty-enhancement hate crimes statutes include gender. Gender-based crimes are also subject to federal sentencing enhancements—although, again, apparently the enhancement has never been applied to a federal crime.

[26] Twenty-two state hate crime statutes now provide enhanced penalties for disability-based crimes.

[27] Hearings before the House Judiciary Committee on H.R. 3081 (July 7, 1998).

[28] Hearings before the Senate Judiciary Committee on S. 1529 (July 22, 1998).

[29] Similarly, in 1968, Congress had determined at that time that certain crimes directed at individuals because of "race, color, religion or national origin" required a federal remedy.

[30] Data provided by the Department of Justice as of September 30, 1998.

[31] An excellent primer on the federal criminal civil rights statutes is an orientation document prepared by federal prosecutors Karla Dobinski, Tamara J. Kessler, and Suzanne K. Drouet of the Criminal Section of the Justice Department's Civil Rights Division.

[32] Joint statement by James E. Johnson, Treasury Department Assistant Secretary for Enforcement, and Deval L. Patrick, Assistant Attorney General for Civil Rights, in hearings before the Senate Judiciary Committee on June 27, 1996.

[33] *Report of the Community Relations Service Church Burning Response Team* (Sep. 30, 1996).

[34] ADL professionals and community leadership, for example, have participated in community institution security conferences, organized community-wide coordinating sessions on the arsons, met with federal, state, and local law enforcement officials to share information on the investigations, assessed the state of hate crime statutes in affected states, and communicated with pastors and congregants from a number of the churches to offer assistance and support. In association with the National Urban League, ADL took out advertisements in major newspapers and has raised over $330,000 for rebuilding efforts.

[35] National Church Arson Task Force, *Second Year Report for the President* (Oct. 1998).

[36] These fires and bombings resonate so meaningfully because there is a historical context for these attacks. They remind us of Night Riders, cross burnings, and Ku Klux Klan terror that was centered on African American churches. Throughout American history, churches and synagogues have provided a focal point for many major cultural and social movements. This is especially true in the African American community: churches served as stops along the Underground Railroad, voting registration posts during Reconstruction, and political headquarters during the Civil Rights Movement of the 1960s. Many of the churches that were burnt are small and rural—the core of a community's social, political, and economic life. Many of these churches offered educational facilities, day care centers, and voter registration and voting poll sites.

[37] National Church Arson Task Force, *supra* note 35, at 18.

[38] 28 U.S.C. § 534.

[39] The Anti-Defamation League has been compiling data on anti-Jewish vandalism and harassment for the past 19 years. In 1997, a total of 1,571 incidents from 43 states and the District of Columbia were reported to ADL regional offices across the country, representing a welcome 9% decrease from the 1996 figure of 1,722. This decline in reported anti-Semitic incidents—which tracks the drop in crime rates across the country—continued a three-year decline. For more information, see Anti-Defamation League, *1997 Audit of Anti-Semitic Incidents* (Jan. 1998) (annual report). In addition, the National Asian Pacific American Legal Consortium (NAPALC) has conducted an annual audit of anti-Asian violence since 1993. In 1997, NAPALC documented 481 anti-Asian incidents, a slight decrease over its 1996 figure of 534. For more information, see National Asian Pacific American Legal Consortium, *1997 Audit of Violence Against Asian Pacific Americans* (Dec. 1998).

[40] Public Law No. 103-322 (Sep. 13, 1994).

[41] According to the Bureau's 1997 HCSA report, the first report to include disability-based hate crimes, 12 such crimes were reported to the Federal Bureau of Investigation (FBI) last year.

[42] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Hate Crime Statistics Act 1991 Report*.

[43] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Hate Crime Statistics Act 1992 Report*.

[44] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Hate Crime Statistics Act 1993 Report*.

[45] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Hate Crime Statistics Act 1994 Report.*

[46] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Hate Crime Statistics Act 1995 Report.*

[47] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Hate Crime Statistics Act 1996 Report.*

[48] U.S. Department of Justice/FBI, Criminal Justice Information Services Division, *Crime in the United States 1997.*

[49] 1997 marks the first year that the number of participating agencies has declined from one year to the next. The six-year increase in the number of agencies that had implemented HCSA reporting mechanisms has been an important measure of its success. In 1998, the Justice Department's Bureau of Justice Statistics awarded a grant to examine why some local law enforcement agencies fail to collect or report hate crimes and why some other agencies have not continued earlier efforts to participate in the HCSA program. With the goal of "improving the accuracy and geographic coverage of hate crime statistics," researchers at the Northeastern University College of Criminal Justice, led by Professor Jack McDevitt, will seek to identify strategies for increasing and sustaining HCSA reporting participation nationwide.

[50] The separate HCSA jurisdiction-by-jurisdiction breakdown reports have been especially useful in helping to gauge the seriousness with which communities are approaching the hate crime data collection effort. The reported hate crime figures provide a measure of accountability for state and local law enforcement authorities. For example, in 1996, the most current jurisdiction-by-jurisdiction information available, 13 *states* (Alabama, New Hampshire, Alaska, North Dakota, Arkansas, South Dakota, Louisiana, Vermont, Mississippi, West Virginia, Montana, Wyoming, and Nebraska) reported 10 or fewer hate crime incidents. Hawaii did not participate in the HCSA program at all. In addition, of the 50 most populous cities in the U.S., 6 did not participate in the reporting of hate crime data at all: Indianapolis, Memphis, Nashville, Charlotte, Honolulu, and Omaha. Other large cities were, quite obviously, egregiously deficient in their HCSA reporting. San Antonio, Miami, Toledo, Buffalo, Santa Ana, Birmingham, Norfolk, Raleigh, Mobile, and Montgomery each affirmatively reported *zero* hate crimes to the FBI. New Orleans, Louisville, and Greensboro each reported one hate crime, Dayton reported two, Milwaukee reported three, Tucson reported four, and Detroit and Tampa each reported five.

[51] Dozens of law enforcement agencies across the country have promulgated new policies and procedures for addressing hate violence. Building on model policies, drafted by, among others, the International Association of Chiefs of Police and the National Organization of Black Law Enforcement Executives, departments have complemented their participation in the HCSA data collection effort with the development of protocols for their officers on how to identify, report, and respond to hate violence.

[52] National Organization of Black Law Enforcement Executives (NOBLE), *Racial and Religious Violence: A Model Law Enforcement Response* (Sep. 1985) (hereinafter, "NOBLE report").

[53] As stated in the International Association of Chiefs of Police's National Policy Center's 1991 Concepts and Issues Paper on Hate Crime: "Swift and effective response to hate crimes helps to generate the degree of trust and goodwill between the community and its law enforcement agency that has long-term benefits for all concerned."

[54] NOBLE report, *supra* note 52, at 36.

[55] For a fine review of these issues, see National Asian Pacific American Legal Consortium (NAPALC), *1995 Audit of Violence Against Asian Pacific Americans* (Aug. 1996) and Japanese American Citizens League, *Walk With Pride—Taking Steps to Address Anti-Asian Violence* (Aug. 1991). NAPALC has also noted that a lack of bilingual police officers can exacerbate community fears and mistrust—and may contribute to an inability to initially identify a hate crime incident and create difficulties in interviewing the victim and conducting an effective investigation.

[56] Reporting rates for gay and lesbian hate crime victims is also likely affected by mistrust and fear of the police. For a particularly sobering review of these issues, see National Coalition of Anti-Violence Programs (NCAVP), *Anti-Lesbian, Gay, Bisexual and Transgendered Violence in 1997* (hereinafter, "NCAVP report"). Information gathered by NCAVP across the country indicates

> *a growing reluctance on the part of victims to report anti-LGBTH [Lesbian, Gay, Bisexual, Transgender, and HIV-positive] crimes to the police and an alarming increase in police indifference or hostility to those victims that did seek police assistance. The resistance of many victims to reporting is validated by the fact that there were significant increases in wrongful arrests, the number of offenders who are members of law enforcement and the number of incidents that occurred in a police precinct/jail.*

NCAVP report, *supra*, at 23.

[57] Collecting data under the HCSA—and training officers to identify, report, and respond to acts of violence based on prejudice—demonstrates a resolve to treat these inflammatory crimes seriously. These positive steps can be amplified by involving representatives of minority communities in the training sessions.

Excellent resources now exist to help municipalities establish hate crime response procedures. ADL has developed a number of hate crime training resources that are available to communities and law enforcement officials, including a comprehensive guide to hate crime laws, a 17-minute hate crime training video on the impact of hate crime and appropriate responses (produced in cooperation with the New Jersey Department of Law and Public Safety), and a handbook of existing hate crime policies and procedures at both large and small police departments. ADL's anti-bias initiatives, coordinated through our A WORLD OF DIFFERENCE Institute, are most often used as proactive measures to help educators, employers, and civic leaders develop the skills, sensitivity, and knowledge to combat bigotry and encourage understanding and respect among diverse groups in the classroom and in the workplace.

[58] Public Law No. 103-322 (Sep. 13, 1994).

[59] Neither the Sentencing Commission nor the Department of Justice publishes separate statistics on the imposition of enhanced penalties in bias-motivated federal crimes. In an effort to determine how many times this relatively new provision had been used since its enactment, however, I spoke with a number of front-line Justice Department prosecutors with broad familiarity with the use of the HCSEA provision—primarily in racial violence cases. None were familiar with a single instance in which enhanced penalties had been applied in a case involving victims targeted because of their sexual orientation, disability, or gender. If true, this fact underlines the importance of expanded training for FBI investigators and Justice Department prosecutors on the potential utility of the HCSEA provision for these crimes.

[60] The NOW LDEF website (*www.NOWLDEF.org*) is an excellent resource for information on violence against women and legal challenges to the Violence Against Women Act (VAWA). Many of the materials on NOW LDEF's website were prepared by Julie Goldscheid, Staff Attorney, who has defended the constitutionality of the VAWA remedy in several federal courts, and Martha F. Davis, NOW LDEF's Legal Director.

[61] The Congressional Black Caucus held hearings on June 20, 1996, and the Senate Judiciary Committee held hearings on June 27, 1996.

[62] "Section 2. Findings," Public Law No. 104-155 (July 3, 1996).

[63] Public Law No. 104-155 (July 3, 1996).

[64] Recognizing that data collection efforts complement criminal prosecutions of hate crime offenders, Congress included a continuing mandate for the Hate Crime Statistics Act as part of the Church Arson Prevention Act, and authorized "such sums as may be necessary to carry out the provisions of this section" through 2002.

[65] For the most comprehensive state-by-state listing of hate crime statutes, see Anti-Defamation League, *1999 Hate Crime Laws: A Comprehensive Guide* (1999).

[66] 508 U.S. 476 (1993).

[67] *Hate Crime Training: Core Curriculum for Patrol Officers, Detectives, and Command Officers; Hate Crime Training: Curriculum for Detectives and Investigators; Hate Crime Training: Curriculum for Patrol and Responding Officers; Hate Crime Training: Curriculum for Command Officers.* These curricula were developed in a partnership between the International Association of Directors of Law Enforcement Standards and Training, the National Association of Attorneys General, the U.S. Department of Justice, and the U.S. Department of the Treasury.

[68] Educational Development Center, Inc. and Massachusetts Criminal Justice Training Council, *National Bias Crimes Training for Law Enforcement and Victim Assistance Professionals* (1995).

[69] Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Report to Congress on Juvenile Hate Crime* (July 1996).

[70] The NCVS data has the potential to provide a very useful, statistically significant measurement of the number of hate crimes committed across the country. As previously noted, hate crime is clearly underreported through the HCSA effort. The NCVS data, however, will also have some limitations. Unlike the HCSA data, the NCVS findings will not be disaggregated by specific jurisdictions across the country. A critically important side benefit of the HCSA data collection effort has been the availability of this jurisdiction-by-jurisdiction reporting. Armed with specific HCSA reports from identifiable jurisdictions, hate crime analysts and community-based advocates have been in a position to gauge the effectiveness of the local reporting effort—and to help prompt expanded HCSA reporting.

[71] The project is training 1,200 teachers in skills necessary to identify, understand, and effectively combat bias-related incidents and hate crime; 400 parents and community leaders as anti-bias, anti-hate crime trainers; and 120 students as peer trainers. A formal curriculum for the training is being developed and emphasis is given to training the trainers so that the gains in the initial year-long pilot will be reproduced at the four program sites and be capable of broad replication. The short-term objective is to have a positive impact on the reported hate crime and bias incidents in the affected school complexes.

Technical assistance is also being provided to school staff to help them integrate multicultural, classroom-ready lessons into their existing curriculum. Resource materials are being provided to help parents create a bias-free home. One outgrowth of the peer training will be a video produced by the peer trainers themselves to use as a discussion starter to help their peers effectively combat prejudice and discrimination.

[72] Department of the Army, *Defending American Values: The Secretary of the Army's Task Force on Extremist Activities* (March 21, 1996).

[73] Section 571, Public Law No. 104-201 (Sep. 23, 1996).

[74] ADL representatives have held a series of meetings with Army investigators and Equal Employment Opportunity (EEO) managers, sharing materials on hate groups and effective response to hate violence. ADL Regional Office professionals have conducted training seminars for commanders and Equal Opportunity officers and trainers on military bases, service academies, and training centers in their regions. These seminars are designed to increase participants' knowledge and awareness of extremist group activity, and to assist military personnel in recognizing and investigating bias-motivated crimes. The Anti-Defamation League and the Defense Department are currently planning additional cooperative training sessions.

[75] *United States v. Machado*, No. SA CR 96-142-AHS (C.D. Calif. Feb. 10, 1998).

[76] A number of state and local authorities have promoted initiatives designed to expand HCSA reporting. In North Carolina, for example, the state Department of Justice has adopted a new strategy to promote HCSA participation. Under this new program, Division of Criminal Information (DCI) field representatives invite individual departments to sign a Memorandum of Understanding that the agency will report HCSA data in return for training by the North Carolina Justice Academy and DCI technical assistance.

[77] In 1990, when some doubted the feasibility and utility of the HCSA data collection program, Congress mandated the data collection initiative only through 1994. Under the leadership of Senators Paul Simon (D-IL) and Orrin Hatch (R-UT), the original sponsors of the HCSA, legislation was introduced in the 104th Congress to provide for a permanent mandate for the Act. This measure, S. 1624, was the subject of hearings before the Senate Judiciary Committee on March 19, 1996, and attracted impressive bipartisan support. The Senate Judiciary Committee approved the measure on April 25, but no further action was taken. Congress included a continuing mandate for the HCSA in the Church Arson Prevention Act of 1996, authorizing "such sums as may be necessary" to implement the HCSA through 2002. This is confusing, however, since the FBI has never received a separate appropriation for outreach and training on the HCSA. Congress should act to eliminate this confusion by enacting a permanent mandate for the HCSA.

[78] The Justice Department's Community Relations Service (CRS) has determined that anti-Semitism can be defined as conflict based on national origin or race and has offered its services in attacks or threats against Jews and Jewish institutions. In addition, CRS has responded to intercommunal violence directed at individuals on the basis of their sexual orientation on at least one occasion. On February 17, 1994, Attorney General Reno exercised her authority under 28 U.S.C. §§ 509-510 to direct CRS to intervene in a community dispute involving a campaign of terror and harassment against a lesbian couple in Ovett, Mississippi. CRS has also provided both valuable staff assistance and significant funding for the inclusive hate crimes outreach and training programs developed by the FBI and Federal Law Enforcement Training Center (FLETC), as well as the comprehensive new training curricula developed and piloted by the Department of Justice.

[79] Of the 8,049 reported hate crimes documented by the FBI under the HCSA for 1997, 2,487 were reported on the basis of sexual orientation and religion. Contrary to the general declining trend in crime statistics, crimes directed against individuals because of their sexual orientation increased in 1997—the only category of crime to do so.

[80] American Psychological Association (APA), *Violence and Youth: Psychology's Response* (1993). The APA report asserts that education programs that reduce prejudice and hostility are integral components of plans to address youth violence. The report concludes that conflict resolution and prejudice reduction programs can provide needed information and skills to prevent youth violence.

[81] There are many existing programs designed to address prejudice. For example, ADL's A WORLD OF DIFFERENCE Institute, founded in Boston in 1985 and now operating in over 30 cities, provides training and educational programming about the roots and consequences of prejudice. A WORLD OF DIFFERENCE combines specially produced television programming, public service announcements, teacher training, curriculum materials, community-based projects, and video resource materials designed to help children and adults explore issues of prejudice and diversity. To date, more than 350,000 elementary and secondary school teachers nationwide have been trained to address prejudice and to value diversity more highly.

[82] Many of ADL's best programs and hate crime prevention initiatives are highlighted in *Hate Crimes: ADL Blueprint for Action*, a publication prepared for distribution at the White House Conference on Hate Crime.

[83] In 1993, the Commerce Department's National Telecommunications and Information Administration (NTIA) published an early study on the connection between broadcast hate and hate violence. NTIA, U.S. Department of Commerce, *The Role of Telecommunications in Hate Crimes* (Dec. 1993). The issue of the impact of hate on the Internet is worthy of further study. The global nature of the Internet permits the Web to reach a worldwide audience—in a simple and inexpensive manner. Many traditional hate groups, like the Ku Klux Klan and other white supremacist groups, have already established anonymous fundraising and propaganda web sites, many designed to appeal to young, impressionable hackers.

While the use of the Internet by cyberhaters, racists, Holocaust deniers, and organized hate groups is disturbing, ADL believes strongly that censorship is not the best way to confront these messages. Rather, the Internet must be closely monitored, with people of goodwill and organizations exposing the bigot and countering his lies and distortions with accurate information. For more information on this issue, see Anti-Defamation League, *High-Tech Hate: Extremist Use of the Internet* (1997). ADL's website address is *www.adl.org*.

Chapter XXI

Religious Discrimination in the Workplace: Administration Policy and Practice

by Richard T. Foltin

Introduction

Title VII of the Civil Rights Act of 1964, which applies to all employers with 15 or more employees, prohibits workplace discrimination on the basis of an individual's religion, just as it prohibits discrimination on the basis of race, color, sex, or national origin. In 1972, Congress amended the Civil Rights Act of 1964 so as to clarify that an employer's failure to reasonably accommodate an employee's religious observance is a form of religious discrimination when the provision of such an accommodation would not impose an undue hardship on the employer's business.

While the number of religious discrimination complaints to, and cases brought by, the Equal Employment Opportunity Commission (EEOC) are but a fraction of the cases brought by that agency, the number of such cases has been on the rise in recent years, signifying that religious discrimination in the workplace remains an ongoing problem. In terms of the legal tools available to combat religious discrimination, the greatest problem area appears to be that class of cases dealing with requests for religious accommodation. The EEOC has, in recent years, demonstrated commendable increased attention to this class of cases, reflecting an interest by the Clinton Administration in this and other issues of religious liberty. In other employment-related areas, in 1997, the President issued guidelines on religious expression in the federal workplace, and in 1998, the Department of Defense issued a directive providing for religious accommodation in the military. Nevertheless, for more than 21 years now, the courts have read the obligation to provide religious accommodation in a constricted fashion that limits the efficacy of that law as a safeguard against religious discrimination. Ultimately, resolution of this problem will probably require an act of Congress, an action likely to take place only with the determined support of the Administration.

I. Religious Discrimination and Religious Accommodation

As guidelines issued by the Equal Employment Opportunity Commission in 1980 state, the "legal principles which have been developed with respect to discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination."[1] An individual who has been denied a job because he is Jewish, Catholic, or Hindu has recourse under the civil rights laws just as would an individual denied a job because she is black, Polish, or a woman.

The definition of religion for purposes of Title VII adopted by the EEOC in its guidelines is broad:

> *[M]oral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether a belief is a religious belief.*[2]

Further, courts have held that Title VII protects against discrimination because of "nonreligion" as well as because of religion.[3]

Religion is, of course, distinct from the other protected categories enumerated in Title VII because for some individuals their religion is not only an issue of identity. An individual's religion may carry with it an obligation to engage in, or refrain from, certain actions that may come in conflict with the rules or structure of the workplace. In 1967, the EEOC issued guidelines defining as a form of religious discrimination an employer's failure, absent undue hardship to its business, to provide a reasonable accommodation of the religious practice of employees and potential employees. Those guidelines, with slight modification, were codified by Congress in 1972 as section 701(j) of Title VII[4] after the U.S. Supreme Court split 4 to 4 in its consideration of a case presenting the question of whether Title VII required religious accommodation.[5]

Section 701(j) of Title VII sets forth the duty to provide religious accommodation by defining "religion" as follows:

> *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious practice without undue hardship on the conduct of the employer's business.*

In enacting this provision, Congress modified the EEOC guidelines so as to shift from the employee to the employer the burden of proving that the accommodation sought is not reasonable.

On its face, section 701(j) presents a reasonable and appropriate balancing of the legitimate business interest of an employer to avoid undue hardship on its operations with the strong public interest in allowing all members of society to earn a livelihood without regard to their race, color, national origin, sex, or religion. Over the last 20 years, however, the balance drawn by Congress has been interpreted by the Supreme Court and lower courts in a fashion that places little restraint on an employer's ability to refuse to provide religious accommodation, forcing upon religiously observant employees a conflict between the dictates of religious conscience and the requirements of the workplace.

In its seminal case in this area, *Trans World Airlines v. Hardison*,[6] the Supreme Court determined, by a 7 to 2 vote, that anything more than a *de minimis* cost to an employer would be an "undue hardship" for purposes of section 701(j). Justice Thurgood Marshall challenged the Court's reading of section 701(j) as reflecting a determination that Congress, in providing that an employer must make reasonable accommodation for religious practice, did "not really mean what it [said]."[7] Justice Marshall went on to state:

> *As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.*[8]

It is in the application of the *Hardison* Court's interpretation of "undue hardship" that religiously observant employees have most often come to grief. Often, even in the absence of nontrivial economic cost to employers, the courts will find that the provision of a reasonable accommodation will amount to an undue hardship. In one case, Mohan Singh—a Sikh Muslim forbidden by his religious precepts from shaving his facial hair except in medical emergencies—applied for the position of manager at a restaurant where he was already employed, but was denied the position because he would not shave off his beard. When the EEOC brought a religious discrimination claim on Mr. Singh's behalf, a federal district court ruled that "relaxation" of the restaurant's grooming standards would adversely affect the restaurant's efforts to project a "clean-cut" image and would make it more difficult for the restaurant to require that other employees adhere to its facial hair policy.[9]

And, beginning with *Hardison* itself, the existence of seniority provisions in a collective bargaining agreement has been invoked as a basis to find undue hardship in the granting of an accommodation because, for instance, to allow the employee his Sabbath off would be in derogation of the seniority rights of another employee. All too often, this conclusion is reached without further inquiry as to whether the bargaining representative might have been enlisted in a search for voluntary swaps, or whether an exemption might be sought for technical violations of the collective bargaining agreement that stand in the way of an amicable arrangement (i.e., an arrangement that did not require a senior employee to give up his or her right not to work on a particular day).

The Supreme Court's lead in restrictively reading section 701(j) has been reflected in lower court rulings on other aspects of how that provision is to be applied. Thus, one might expect a "reasonable accommodation" to be one that actually removes the conflict with religious practice, with employers then required to show an "undue hardship" before being relieved of the obligation to provide such an accommodation. But this is often not the case. Perhaps most remarkably, some courts have suggested—beginning with *Hardison*—that employees' rights under collective bargaining agreements (such as the creation of a neutral system for shift allocation) are, in and of themselves, reasonable accommodations even when those agreements make absolutely no provision for employee religious practices that may come into conflict with the requirements of the workplace. In one recent appellate decision, now awaiting rehearing before the full appellate panel, a federal court concluded that the existence of a neutral shift allocation system meant that the employer was absolved of even attempting to afford an accommodation.[10]

In considering another aspect of the application of section 701(j), the Supreme Court held in 1986 that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate and that the employer could refuse alternatives that were less onerous to the employee, but still reasonable." *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). In that case, a teacher had used up the three paid days available annually for religious observance, and wanted to use additional contractual personal leave time for additional religious observance. The Court declined to find that the employer was obligated to accept the employee's desire to use personal leave time in this fashion in lieu of giving the employee time off without pay.[11]

It would be an overstatement to say that employees seeking a reasonable accommodation of their religious practices never prevail in court, to say nothing of the many whose requests for accommodation are worked out amicably with employers. But the prevailing constrictive reading of section 701(j) is such that for the most part, to borrow the title of one law review article on the subject, "heaven can wait." As Professor Roberto L. Corrada of the University of Denver College of Law told the Senate Committee on Labor and Human Resources at a hearing on October 21, 1997, "[t]he case law in this area is replete with histories of hard working and productive people who have lost their jobs because of conflicts between workplace policies and the requirements of religious conscience."

This situation is inconsistent with the principle that religious discrimination should be treated fully as seriously as any other form of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination to be found elsewhere in this nation's civil-rights laws. Since the problems in this area turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by Congress. Absent such correction, there is a limit to how far the EEOC can go in vindicating the protection against religion discrimination contemplated by Congress when it enacted section 701(j).

II. The EEOC and Religious Discrimination

The Equal Employment Opportunity Commission is charged with enforcing the anti-discrimination provisions of Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act. In February 1996, recognizing that limited resources made a policy of "full investigation and enforcement" of all cases arising under these laws unfeasible, the EEOC issued its National Enforcement Plan identifying priority issues and setting forth a plan for "administrative enforcement and litigation of the laws within its jurisdiction." Priority was given to three classes of enforcement cases: (1) "Cases involving violations of anti-discrimination principles which by their nature could have a potential significant impact beyond the parties to a particular dispute," (2) "[c]ases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the Commission," and (3) "[c]ases involving the integrity or effectiveness of the Commission's enforcement process, particularly the investigation and conciliation of charges." Among the ten enumerated types of cases falling under the second of these enforcement priorities were "[c]laims clarifying the Title VII duty to reasonably accommodate religious practices," a recognition that religious accommodation is an important aspect of an equal employment opportunity regime.

Data provided by the EEOC reflects increased attention to religious discrimination claims during the last five years, as well as a favorable resolution rate for those claims as compared to total claims received by the EEOC. For FY1994 through FY1998, the merit resolutions[12] of overall claims filed with the EEOC under Title VII and other civil rights laws totaled as follows:

EEOC Total Claims

	Receipts	Resolutions	Merit Resolutions
FY1994	91,189	71,563	11,100 15.5%
FY1995	87,529	91,774	10,921 11.9%
FY1996	77,990	103,467	9,430 9.1%
FY1997	80,680	106,312	11,668 11.0%
FY1998	79,786	101,459	12,631 12.4%

As the next table reflects, the percentage of cases alleging religious discrimination is not a large fraction of the total number of charges filed with the EEOC during this period. Nevertheless, the percentage of merit resolutions of religious discrimination claims is comparable with the overall rate of such resolutions:[13]

EEOC Religious Discrimination Claims

	Receipts	Resolutions	Merit Resolutions
FY1994	1,546	1,274	221 17.3%
FY1995	1,581	1,606	207 12.9%
FY1996	1,564	1,911	165 8.6%
FY1997	1,709	2,137	258 12.1%
FY1998	1,789	2,247	325 14.5%

Of the religious discrimination claims filed with the EEOC, claims filed based on an alleged denial of reasonable accommodation are, in turn, but a fraction of that case load—albeit, with an even higher proportion of merit resolutions:

EEOC Denial of Reasonable Religious Accommodation Claims

	Receipts	Resolutions	Merit Resolutions
FY1994	153	76	29 38.2%
FY1995	161	135	35 25.9%
FY1996	192	177	39 22%
FY1997	195	240	59 24.6%
FY1998	215	184	54 29.3%

The small proportion of religious accommodation cases, as compared to the overall number of religious discrimination claims, suggests—at least on an impressionistic basis—that the number of accommodation cases coming in the door may be undercounted, perhaps because of miscoding when cases are analyzed for categorization. And there is, of course, no way of knowing how many people have not brought claims because they were advised, either by an enforcement agency or by private counsel, that the current state of the law leaves them without recourse and, therefore, forced to choose between violating a religious precept or giving up a source of livelihood.

In any event, the reported increase over the last five years in the number of religious discrimination and religious accommodation claims continues an upward trend from previous years. This could be attributable to any or all of a number of factors: the EEOC's apparently greater attention to religious discrimination claims; increased willingness on the part of religiously observant employees to press for accommodation; and an ongoing reluctance by employers to provide accommodation based on a narrow view of the types of accommodations they are obligated—or willing—to provide. There are also external social factors at work, such as the trend toward businesses that operate on a 24-7 (24 hours a day, seven days a week) basis combined with the repealing of "blue laws" that prohibit businesses from remaining open on Sunday, thereby increasing the likelihood that strict Sabbath observers will come into conflict with employers. Perhaps more crucially, as American society becomes more diverse and pluralistic, conflict more often arises between the "neutral" rules of the workplace, which are acceptable to workers who are secular or share the practices of the majority faiths, and those of minority faiths.

Recent years have seen more reports in the media of religious accommodation claims brought by the EEOC, as well as by state human rights agencies. For example, in 1995, *The Wall Street Journal* reported on a "ground-breaking settlement" by Wal-Mart of an EEOC religious discrimination lawsuit brought when the chain refused to accommodate an employee's request not to work on his Sabbath. While denying any wrongdoing, Wal-Mart agreed to pay a settlement to the employee and to train its managers in how to accommodate workers' religious beliefs. This followed on the settlement earlier that year of a similar claim against Dillard Department Stores, Inc.,[14] with Dillard agreeing, as part of the settlement and while denying any wrongdoing, to institute a formal procedure for handling religious accommodation requests. And in July 1997, the EEOC announced its commencement of an action against US Airways for that company's refusal to allow a Muslim woman to wear a religiously required head scarf while on duty as a flight attendant. The case was ultimately settled.

Of course, whatever the willingness of the EEOC to bring religious discrimination claims or to test the parameters of religious accommodation law, enforcement of protections against religious discrimination can only be as effective as the present state of the law allows. Thus, in 1993, the EEOC issued a proposed revision to existing guidelines on religious accommodation to incorporate the holding in *Philbrook* that an employer meets its obligation to provide a reasonable accommodation if an offered accommodation resolves the religious conflict, even if the accommodation is not one that the employee prefers.[15] When Congressman Jerrold Nadler (D-NY) suggested to the EEOC that the proposed guidelines were untimely and unnecessary in light of pending legislation, the EEOC responded, in a letter dated December 22, 1993, that the proposed guidelines merely reflected the law established in *Philbrook*. (To date, the final guidelines have not been issued.)

III. The Workplace Religious Freedom Act

Since the constrictive readings of section 701(j) discussed above turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by Congress. The just-concluded 105th Congress saw the introduction of a bill, the Workplace Religious Freedom Act (WRFA) (S.1124/ H.R.2948), intended to do just that. Senators John Kerry (D-MA) and Dan Coats (R-MA) were the chief sponsors on the Senate side and Representatives Bill Goodling (R-PA) and Jerrold Nadler (D-NY) were the chief sponsors in the House.

Instead of the "not more than *de minimis*" interpretation of the term "undue hardship" established in the *Hardison* case, WRFA would define "undue hardship" as an action requiring "significant difficulty or expense" and would require that, to be considered an undue hardship, the cost of accommodation must be quantified and considered in relation to the size of the employer. In this respect, it would resemble (although not be identical with) the definition of "undue hardship" set forth in the Americans with Disabilities Act.[16] WRFA also would require that to qualify as a reasonable accommodation an arrangement must actually remove the conflict; an "attempt to accommodate" that fails to accommodate a religious practice would not, in and of itself, be viewed as a "reasonable accommodation." (The accommodation might, of course, constitute an undue hardship, but that is a distinctive concept.) Finally, among its other provisions, WRFA would, however, allow religiously observant employees and their employers—and, where pertinent, sympathetic fellow employees—to make commonsense arrangements to accommodate religious practice, including voluntary shift swaps or modifications of work hours, without being deemed to have violated the rights of fellow employees.

It has been suggested by some commentators that the reading of "undue hardship" to mean not more than *de minimis* difficulty or expense was necessary to avoid a reading of the accommodation provision that would have caused it to run afoul of the Establishment Clause. But Justice Marshall's dissent in *Hardison*, joined by Justice Brennan, saw no constitutional problem in requiring employers "to grant privileges to religious observers as part of the accommodation process." Justice Marshall went on to state: "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer."[17] He added in a footnote:

> *The purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions. . . . And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of "sponsorship, financial support, and active involvement of the sovereign in religious activity," against which the Establishment Clause is principally aimed.*[18]

In sum, supporters of WRFA contend, a reading of section 701(j) that affords meaningful protections for religiously observant employees is consistent with the Establishment Clause's requirement that government action not favor one religion over another, or religion over nonreligion.

A hearing on the Workplace Religious Freedom Act was held by the Senate Committee on Labor and Human Resources on October 21, 1997. No further action on the bill took place in the 105th Congress.

IV. Religious Accommodation and Religious Harassment

Title VII's prohibition on religious discrimination includes the right of employees to be free from harassing and derogatory slurs and epithets targeted at them because of their religious beliefs, just as the prohibition on discrimination on the basis of race, sex, or national origin encompasses protection from harassment on those bases as well. The issue of religious harassment was thrown into the spotlight when, in November 1993, the EEOC issued proposed guidelines outlining standards of workplace behavior that do not violate the prohibition on religious, as well as racial, sexual, and national origin, harassment.[19] The EEOC had earlier issued guidelines on harassment only with respect to a particular class of sexual harassment claims. The new EEOC guidelines were intended to provide broader guidance and training to employers as to their obligations vis-à-vis harassment claims.

The guidelines did not, however, clearly delineate what kinds of religious expression would constitute harassment, leading some to argue that religious harassment should be excluded from the guidelines based on the perception that the inclusion of that category of claims would lead employers to create a "religion-free zone" in the workplace. Others, more sympathetic to the EEOC's desire to clarify uncertainties in the law, argued that to exclude religious harassment from guidelines on harassment generally would suggest that religious harassment was less serious than other forms of harassment. Many of these supporters of guidelines urged, nevertheless, that the guidelines be redrawn so as to avoid any inference that religious expression in the workplace is forbidden. It was suggested by this last group of advocates that, among other changes, the guidelines should include examples of religious expression that do not constitute harassment, such as wearing a cross on a lapel or casually discussing religion among fellow employees. In November 1994, following a Senate hearing on religious harassment and the inclusion in appropriations legislation of language that restricted EEOC autonomy in dealing with that subject, the EEOC withdrew the entire set of guidelines. No further action has been taken.

The absence of guidelines does not mean, of course, that religious harassment is permitted by Title VII. In her concurring opinion in *Harris v. Forklift Systems, Inc.*,[20] Supreme Court Justice Ruth Bader Ginsburg reaffirmed that Title VII's prohibition of religious discrimination bars religious harassment just as much as that statute's prohibition of sexual discrimination prohibits sexual harassment.

The EEOC's withdrawal of the proposed guidelines leaves employers—and employees—without needed clarification as to which kinds of acts do and do not constitute religious and other forms of harassment. Wherever that line is to be drawn, it necessarily must be complementary to the statutory obligation of employers to afford a reasonable accommodation and thus cannot be construed so as to require employers to turn the workplace into a "religion-free zone." To the contrary, any employer who attempted to preclude employees from expressing their own religious beliefs and practices in a nondisruptive fashion might well violate the obligation of reasonable accommodation. By definition, prohibitions on harassment, whether the harassment be religious, sexual, or racial, reaches only exacerbating and aggravating circumstances and conduct. In so doing, the ban on religious harassment serves the same purpose as the obligation to provide reasonable religious accommodation—ensuring that the American workplace provides an equally welcoming environment for those of all faiths, and of none.

V. Other Administration Action on Religious Discrimination

The EEOC has not been the only venue in which the Administration has dealt with issues of religious discrimination in the workplace. On August 14, 1997, President Clinton issued guidelines on religious exercise and religious expression in the federal workplace that, at least with respect to federal employees, went far in clarifying the complementary relationship between prohibitions on harassment and the obligation to provide religious accommodation.

The guidelines set forth federal policy in three areas: religious expression in the workplace, religious discrimination, and religious accommodation:

1. Federal employees may engage in personal religious expression in the same fashion as other speech entitled to constitutional protection, consistent with workplace efficiency and the requirements of law. As with other speech, a federal agency may restrict speech that "truly interferes with its ability to perform public services" or that unduly interferes with the legitimate rights of others. There is one important exception to the equivalent treatment of religious and nonreligious speech in the federal workplace: because of the First Amendment's prohibition on government establishment of religion, religious speech by a government employee may be restricted when

that speech would lead a reasonable observer to conclude that government is endorsing religion.

2. Federal employers may not discriminate in employment on the basis of religion. This means, of course, that an employment decision, whether as to hiring or promotion or other matter, may not turn on the employee's religion or religious beliefs. Beyond this, an employee may not be coerced to participate in religious activities or to refrain from participating in otherwise permissible religious activities; and no supervisor or employee may engage in religious harassment or otherwise create, through the use of intimidation or pervasive or severe ridicule or insult, a religiously hostile environment.

3. Federal employees are to be reasonably accommodated in their religious practices in the absence of nonspeculative costs and even though accommodation may impose some hardship on the agency's operations. This framing of the obligation to provide a religious accommodation accepts as a given the interpretation of that obligation set forth in *Hardison*, but gives *Hardison* the most generous plausible reading.[21]

The balance drawn by the guidelines is illustrated by its treatment of government employees who, in fulfillment of the obligations of their faith, wish to proselytize their fellow federal employees. The guidelines note that "[a]s a general matter, proselytizing is as entitled to constitutional protection as any other form of speech—as long as a reasonable observer would not interpret the expression as government endorsement of religion." Failure to desist "when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome" is, however, prohibited as religious harassment. In addition, the guidelines provide that particular care must be taken when a supervisor engages in religious expression to avoid the perception by employees that any coercion of religious or nonreligious behavior is involved. Finally, the guidelines hold that if the religious expression involved is "derogatory language [conveyed] in an assaultive manner [it] can constitute statutory or religious harassment if it is severe or invoked repeatedly."

In another action on the religious discrimination front, in 1998, the Department of Defense reissued and revised a directive on accommodation of religious practices in the military services. Department of Defense Directive 1300.17 provides that commanders are to approve requests for religious accommodation "when accommodation will not have an adverse impact on military readiness, unit cohesion, standards or discipline." The accommodation of military personnel with respect to religious practices by allowing for participation in worship services, observance of holy days, provision for separate or supplemental food rations, waiver of immunizations, and the wearing of neat and conservative items of religious apparel that do not interfere with military duties is set as a "goal." The Directive calls for the various service branches to include materials on religious traditions, practices, and policies in military curricula and to develop statements advising military personnel of the religious accommodation policy.

The development of this policy, which was already manifest in the predecessors to Directive 1300.17, represents a marked evolution in the position of the military on religious accommodation. In 1986, the U.S. Supreme Court declared in *Goldman v. Weinberger*[22] that the First Amendment's Free Exercise Clause did not require the Air Force to provide an exemption from dress regulations in order to permit an Orthodox Jew to wear a yarmulke while on active duty as a military psychologist. The state interest in uniform appearance and resultant morale was cited without any discernible weight being given to the choice forced upon members of minority faiths of either violating their religious obligations or forgoing military service. A dissenting Justice O'Connor criticized this result as reflecting "[not] even the slightest attempt to weigh [Captain Goldman's] asserted right to the free exercise of his religion against the interest of the Air Force in the uniformity of dress within the military hospital."[23]

Responding to the Court's decision, in 1987, Congress enacted legislation that affords military personnel the right to "wear an item of religious apparel while wearing the uniform of the member's armed force," except under circumstances in which an item is not "neat or conservative" or its wearing "would interfere with the performance of the member's military duties." (10 U.S.C. § 774). The 1998 Department of Defense Directive delineates the standards to be applied in implementing section 774, but goes further by implementing the spirit as well as the letter of that law. Thus, in contrast with the military's reliance in *Goldman* on uniformity as a *sine qua non* of military policy, the Directive provides that absolute uniformity shall be a basis to deny religious accommodation only in a limited category of cases: "A complete prohibition on the wearing of any visible items of religious apparel may be appropriate under *unique* circumstances in which the member's duties, the military mission, or the maintenance of discipline require absolute uniformity." Participation in ceremonial functions, such as parades or honor guards, is cited as an example of such unique circumstances.

Moreover, although section 774 deals only with the narrow issue of religious apparel, the Department of Defense has broadly adopted the principle of religious accommodation to a range of other situations. Thus, the 1998 Directive refers to the high value the Department of Defense places "on the rights of members of the Armed Forces to observe the tenets of their respective religions." How well this policy, which some might argue flies in the face of the historic attitudes and practices of the military, is being implemented is another issue. Nevertheless, the Administration and the Department of Defense have espoused a desire that the military, consistent with the requirements of military necessity, provide a hospitable environment for members of all faiths.[41]

VI. Next Steps

The record of the Equal Employment Opportunity Commission over the last few years, taken together with other actions of the Clinton Administration, reflects a commendable interest in the problem of religious discrimination in the workplace. Nevertheless, there remains much to be done, particularly with regard to remedying inadequacies in the law on religious accommodation and clarifying the law on religious harassment.

Actions that should be considered for the remaining years of the Clinton Administration would include:

A. Religious Accommodation

- *The EEOC guidelines for claims of religious accommodation should be revisited in light of development in the law since their initial adoption, the principles established in President Clinton's guidelines on religious expression in the federal workplace, and the enactment and implementation of the Americans with Disabilities Act, a statute requiring accommodation of persons with disabilities that builds upon the principles first articulated in section 701(j).*

- *In addition, the EEOC should reexamine its internal procedures for handling and coding religious accommodation cases, including training of personnel.* The small proportion of religious accommodation cases, as compared to the overall numbers of religious discrimination claims, suggests—at least on an impressionistic basis—that the number of accommodation cases coming in the door is being undercounted. It is also crucial that EEOC line personnel understand the seriousness accorded to religious discrimination claims, including those based on employer failure to provide a reasonable accommodation. *Further, the EEOC should seek to more aggressively implement its enforcement plan making it a priority to pursue cases that will clarify the law of religious accommodation.* This would include additional bringing of cases on unresolved questions of law, and additional filing of amicus curiae briefs in cases brought by private parties.

Of course, the adjustment of procedures and bringing of cases will only do so much, given the prevailing constricted reading of section 701(j). Various

Administration officials have expressed support for the concept of strengthening the protection against discrimination afforded religiously observant employees, but to date the Administration has not endorsed the Workplace Religious Freedom Act. To be sure, there may be legitimate concerns as to specifics of the bill in its current form to be addressed before an endorsement is forthcoming—but the resolution of those concerns should be a priority so that the Administration can begin to add its resources to promoting passage of this or similar legislation.

B. Religious Harassment

- Although the EEOC's proposed guidelines on religious harassment were subject to criticism on specifics, the withdrawal of those guidelines—as opposed to their amendment—leaves this area in an unfortunate state of uncertainty. Religious harassment remains against the law, but employers and employees have been denied crucial guidance as to what compliance with the law requires and how to reconcile the prohibition on religious harassment with the obligation of an employer to afford religious accommodation. *The EEOC should explore issuance of new proposed guidelines, looking to the much-praised presidential directive on religious expression in the federal workplace as a model.*

C. Other

- Both the EEOC and the Justice Department have personnel explicitly tasked with implementing the Americans with Disabilities Act (ADA), apparently because the ADA is relatively new legislation for which there are a number of unresolved questions and because this law was enacted separately from Title VII. Whatever the reasons, there seems to have been a beneficial effect in terms of the priority and attention given to disability issues by the Administration's enforcement agencies. *The Administration should consider similar changes in institutional structures that might be made to make enforcement of the law on religious discrimination (including religious accommodation and religious harassment issues) the responsibility of specific officials within the pertinent agencies.*

As is the case with other forms of protection against invidious discrimination, the prohibition on religious discrimination in the workplace ensures that all members of society, whatever their religious beliefs or practices, will not unfairly be denied equal employment opportunities based on aspects of their identities that are not pertinent to their ability to do the job—a principle of fairness that is part of our national birthright and pride. The measures suggested here are important steps that the Administration, and the Equal Employment Opportunity Commission in particular, can take in moving forward toward that shared goal.

Endnotes

[1] 29 C.F.R. § 1605.2.

[2] 29 C.F.R. § 1605.1 (1993).

[3] See *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (Title VII protects employees from adverse employment actions for refusing to attend their employer's devotional service).

[4] 42 U.S.C. § 2000e(j).

[5] *Dewey v. Reynolds Metals, Inc.*, 402 U.S. 689 (1971).

[6] 432 U.S. 63 (1977).

[7] 432 U.S. at 86, 87.

[8] 432 U.S. at 87.

[9] *EEOC v. Sambo's of Georgia*, 530 F. Supp. 86 (N.D.Ga. 1981).

[10] *Balint v. Carson City, Nevada*, 144 F.3d 1225, *decision withdrawn pending en banc hearing*, 152 F.3d 1223 (9th Cir. 1998).

[11] Arguably, the approach to section 701(j) delineated in *Philbrook* is inconsistent with cases on racial and national-origin discrimination in which the Court has held that a plaintiff can successfully demonstrate discrimination by proving the existence of alternative employment practices which have a less adverse impact on minorities, but which nevertheless fulfill the employer's business needs. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989).

[12] "Merit resolutions" are defined by the EEOC as "charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations."

[13] Based on the time that it generally takes the EEOC to process a claim to its conclusion, one would expect, on average, that approximately one-half of the claims received by the EEOC are resolved in that fiscal year and the balance resolved in a subsequent fiscal year. This means, of course, that the case resolutions reflected in this and subsequent tables are not entirely a subset of the cases included in the "receipts" column.

[14] *The Wall Street Journal*, Aug. 22, 1995, at B1.

[15] 58 Federal Register 49,456 (1993).

[16] Supporters of the Workplace Religious Freedom Act contend that the Americans with Disabilities Act presents an apt analogy to the provisions of section 701(j). As it later did for Americans with disabilities, Congress determined in enacting section 701(j) that the special situation of religiously observant employees requires accommodation so that those employees would not be deprived of equal employment opportunities.

[17] *Trans World Airlines v. Hardison*, 432 U.S. 63, 91 (1977).

[18] 432 U.S. at 90-91 n. 4. Justices Marshall and Brennan were, of course, both resolute supporters of a strict reading of the Establishment Clause. Thus, it is of particular note that neither believed that the Constitution requires a weak reading of section 701(j). See also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) ("[A] statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. . . . Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only . . . Sabbath observance, I believe an objective observer would perceive it as an anti discrimination law rather than an endorsement of religion or a particular religious practice.").

[19] 58 Federal Register 51,266 (1993).

[20] 510 U.S. 17, 114 S. Ct. 367, 372-73 (1993).

[21] It is likely the case, moreover, that the Administration has a proprietary right, as employer, to go beyond *Hardison* in providing an accommodation, as a private employer would be free to do. In addition, federal employees are afforded a specific statutory right to utilize compensatory time for religious observance pursuant to a 1978 congressional enactment. 5 U.S.C. § 5550a. Finally, federal employees may have a claim to religious accommodation under the Religious Freedom Restoration Act ("RFRA"). RFRA was struck down as unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), at least insofar as it regulated state and local activity. However, the Administration has taken the position that the statute continues in force and effect insofar as it pertains to the federal government.

[22] 475 U.S. 503, 106 S. Ct. 1310 (1986).

[23] 106 S. Ct. at 1325.

[24] Although not an employment-related area, the Administration's interest in religious liberty issues was also reflected by its action in 1996 in issuing Executive Order 13007, directing that federal lands be managed in such a fashion as to accommodate access by American Indians to sacred sites for ceremonial use and avoid adversely affecting the physical integrity of such sacred sites.

Chapter XXII

Lesbian and Gay Rights During President Clinton's Second Term

by Christopher E. Anders

I. The President's Leadership

During the first half of his second term, President Clinton continued his decidedly mixed record on lesbian and gay rights. While the President has advanced lesbian and gay rights further than all of his predecessors combined, he also has harmed the lesbian and gay rights movement by actively opposing the ability of openly lesbian and gay members of the armed forces to serve and the right of couples of the same sex to have the same access to marriage as couples of opposite sexes.

The President has boldly used his office to help legitimize the lesbian and gay rights movement as an integral part of the broader civil rights movement. He routinely includes gay issues in his public speeches on civil rights and forcefully advocates for legislation protecting persons based on sexual orientation. His willingness to use his position to focus the nation on lesbian and gay rights has helped shift those issues into the mainstream of American political life.

The Clinton Administration has also defended gains made at the state and local levels through veto threats of anti-gay federal legislation. For example, during the 1999 appropriations process, the President threatened to veto the District of Columbia appropriations bill if it contained an amendment that would have banned joint adoptions in the District of Columbia by unmarried couples. The threat helped convince Congress not to reverse a court decision permitting lesbian and gay couples to adopt children jointly. The President has also used his office to push for proactive civil rights legislation such as the Employment Non-Discrimination Act and the Hate Crimes Prevention Act.

During the past two years, the Administration has continued to produce a string of firsts: the first openly lesbian or gay nominee for an ambassadorship in James Hormel; the first openly lesbian or gay nominee for the head of a federal agency in Elaine Kaplan; and the first appearance of a president before a lesbian and gay rights organization in the President's speech to the Human Rights Campaign. The Administration also has used its existing statutory authority to make several important regulatory changes, including: issuing an executive order banning discrimination based on sexual orientation in all civilian federal workplaces; providing new guidelines to public schools explicitly stating that Title IX's prohibition of sex discrimination bars anti-gay sexual harassment; requiring the Internal Revenue Service to treat all taxpayers, including applicants for tax-exempt status, without regard to sexual orientation; issuing a directive ensuring that all providers of federal health insurance abide by nondiscrimination rules, which include sexual orientation; and granting asylum for gay men and lesbians facing persecution in other countries.

Despite those significant advances, two actions by the President continue to damage the fight for equality. The Administration's defense of the "don't ask-don't tell" compromise reached in the first year of the first Clinton Administration harms both individual lesbian and gay members of the military and the larger movement. The policy destroys the lives and careers of many members of the military who must choose between remaining closeted or losing their careers. Vigorous enforcement of the policy has also resulted in allegations by female military personnel that male superiors implicitly threatened to charge them with being homosexual in order to coerce sex. Finally, the Administration's defense of "don't ask-don't tell" has resulted in the federal government making legal arguments and defending cases that may create harmful legal precedents.

Similarly, the President's support for the Defense of Marriage Act (DOMA) caused lasting damage. The Administration's strong record on many other lesbian and gay civil rights issues made the President's support for DOMA even more damaging. His signing of DOMA sent a signal to state legislators that even otherwise supportive legislators could vote for anti-gay marriage legislation. During the two years since the President signed DOMA, a majority of states have passed laws that forbid marriage between same-sex couples and refuse to recognize any such marriages performed in other states.

II. Anti-Gay Appropriations Riders During the 105th Congress

The appropriations process at the end of the 105th Congress brought several attempts to roll back civil rights protections for lesbians and gay men. The Administration played an important role in defeating the following nongermane anti-gay amendments to federal spending legislation.

Legislative Attack on President's Anti-Discrimination Executive Order. Congressman Joel Hefley (R-CO) offered an amendment to an appropriations bill prohibiting any enforcement of the President's Executive Order banning discrimination based on sexual orientation in all civilian federal workplaces. By a strong bipartisan vote, the House rejected the Hefley Amendment by a vote of 252 to 176.

Legislative Attack on San Francisco Domestic Partnership Law. Congressman Frank Riggs (R-CA) introduced an amendment to a federal housing appropriations bill that would have cut federal funding to San Francisco because it has an effective domestic partnership law. Although the Amendment passed the House by a vote of 214 to 212, a conference committee killed the Amendment before the appropriations bill's final passage.

Legislative Attack on District of Columbia Adoption Law. Congressman Steve Largent (R-OK) sponsored an anti-gay amendment to the appropriations bill that provided funds for the District of Columbia. The Largent Amendment would have prohibited the District of Columbia from spending any funds on joint adoptions by unmarried persons. A coalition of civil liberties and children's advocacy organizations lobbied in opposition to the Amendment. Although those lobbying efforts helped to defeat the Amendment in the Appropriations Committee, the House leadership allowed the full House to vote on the Amendment as a way to appease its right wing, which had lost a vote on their anti-gay Hefley Amendment just one day earlier. The Largent Amendment passed the House of Representatives by a vote of 227 to 192, but was not included in the final appropriations bill signed by the President.

III. Federal Civil Rights Legislation During the 105th and the 106th Congresses

In addition to defending against anti-gay attacks during the appropriations process, advocates for lesbian and gay rights worked for legislative and regulatory changes that would protect lesbians and gay men from discrimination. Congress considered, but did not pass, the following legislation during the 105th Congress and is likely to focus again on these issues during the 106th Congress.

A. Anti-Discrimination Legislation

During the 106th Congress, Congress is likely to continue its consideration of the Employment Non-Discrimination Act (ENDA), which would, for the first time, provide a federal remedy for discrimination against lesbians and gay men in most workplaces employing 15 or more employees. It would ban discrimination based on sexual orientation in all aspects of employment, including hiring, firing, promotion, compensation, and most terms and conditions of employment.

Although all arbitrary discrimination is wrong, workplace discrimination is especially egregious. One example of this type of discrimination is the story of Robin Shahar, an attorney who lost a job offer from the State of Georgia Department of Law. Ms. Shahar graduated sixth in her class from Emory University Law School, was an editor of the *Emory University Law Review*, and clerked for the Georgia Department of Law. Despite those outstanding credentials, the Department withdrew its job offer after discovering that Ms. Shahar is a lesbian. The United States Court of Appeals for the Eleventh Circuit recently decided that Ms. Shahar had no valid claim to fight the discrimination against her. The court would not have reached that decision if ENDA were law.

The threat of discrimination is a very real presence in most American workplaces. Most gay men and lesbians attempt to protect themselves against discrimination by hiding their identity. Hiding is not easy. It requires carefully policing even the most casual conversations, and banishing almost any acknowledgment of family and friends from the workplace. In addition to being difficult to do, hiding one's identity takes a terrible psychological toll on the person hiding, and often results in co-workers building walls between each other.

Studies and experience show that discrimination against lesbians and gay men in the workplace is arbitrary. Claims that lesbians and gay men are mentally ill, or that they harm the efficiency of the workplace, have been proven to be baseless myths. Lesbians and gay men are capable employees, neither better nor worse than their heterosexual counterparts.

Ten states, numerous local governments, and many corporations, schools, and universities ban discrimination based on sexual orientation. Even with those state and local laws, however, very few people are protected against workplace discrimination based on sexual orientation. Contrary to popular belief, the vast majority of workers receive no protection from state or local laws. Without ENDA, many hard-working men and women will have little or no protection against discrimination.

ENDA would ban discrimination based on sexual orientation in all aspects of employment, including hiring, firing, promotion, compensation, and most terms and conditions of employment. ENDA's ban on discrimination would protect heterosexuals, lesbians, and gay men, as well as workers who associate with gay and lesbian co-workers. ENDA would also protect workers from retaliation.

ENDA is modest. It would apply only to discrimination in employment, not to housing or public accommodations, and only to employers with 15 or more employees. ENDA explicitly would not require that fringe benefits be provided to the partners of lesbian and gay workers. ENDA also would expressly forbid the uses of quotas or preferential treatment.

In addition, ENDA would not apply to the armed forces and would have no effect on veterans' preference programs. ENDA also would not apply to religious organizations, except to the extent that they engage in commercial businesses so divorced from their religious functions that they are subject to federal income tax. The exemption would explicitly include religious schools and hospitals.

In its basic structure, ENDA parallels Title VII of the Civil Rights Act of 1964, the law which prohibits employment discrimination based on race, religion, gender, and national origin. It provides procedures and remedies similar to those of Title VII.

In short, ENDA would forbid employment discrimination based on sexual orientation—nothing more and nothing less. By passing ENDA, the 106th Congress would help ensure that everyone can enter and succeed in the workplace without regard to sexual orientation. In this way, Congress could begin the process of putting an end to discrimination based on sexual orientation.

B. Expansion of the Federal Criminal Civil Rights Statute

The 106th Congress is also likely to continue its consideration of the Hate Crimes Prevention Act, which would amend the principal federal criminal civil rights statute to address the continuing problem of an inadequate state and local response to violent attacks on persons based on race, color, national origin, religion, sexual orientation, gender, or disability.[1]

Properly drafted legislation is particularly timely as a response to the rising tide of violence directed at people because of the above characteristics. Those crimes convey a constitutionally unprotected threat against the peaceable enjoyment of public places to members of the targeted group.

Pursuant to the Hate Crime Statistics Act, the Federal Bureau of Investigation annually collects and reports statistics on the number of bias-related criminal incidents reported by local and state law enforcement officials. In 1996, based on reports from law enforcement agencies covering 84% of the nation's population, the FBI reported 8,759 incidents covered by the Act. Of those incidents, 5,396 were related to race, 1,401 to religion, 1,016 to sexual orientation, 940 to ethnicity or national origin, and 6 to multiple categories.

Existing federal law does not provide any separate offense for violent acts based on race, color, national origin, or religion, unless the defendant intended to interfere with the victim's participation in certain enumerated activities (18 U.S.C.A. § 245(b)(2)). During hearings in the 105th Congress, advocates for racial, ethnic, and religious minorities presented substantial evidence of the problems resulting from the inability of the federal government to prosecute crimes based on race, color, national origin, or religion without any tie to an enumerated activity. Those cases include violent crimes based on a protected class, which state or local officials either inadequately investigated or declined to prosecute.

In addition, existing federal law does not provide any separate offense whatsoever for violent acts based on sexual orientation, gender, or disability. The exclusion of sexual orientation, gender, and disability from section 245 can have bizarre results. For example, in an appeal by a person convicted of killing a black gay man, the defendant argued that "the evidence established, if anything, that he beat [the victim] because he believed him to be a homosexual and not because he was black."[2] In affirming the conviction because of violence based on race, the court cited, among other things, testimony that the defendant killed the black gay victim, but allowed a white gay man to escape after the defendant broke a dowel rod on the white gay man's head.[3] Striking or killing a person solely because of that person's sexual orientation would not have resulted in a conviction under that statute.

Other accounts of violence because of a person's sexual orientation include:

- A report by the Human Rights Campaign of "[a] lesbian security guard, 22, [who] was assigned to work a holiday shift with a guard from a temporary employment service. He propositioned her repeatedly. Finally, she told him she was a lesbian. Issuing anti-lesbian slurs, he raped her."

- An account by Mark Weinress, during an American Psychological Association briefing on hate crimes, of his beating by two men who yelled "we kill faggots" and "die faggots" at him and his partner from the defendants' truck, chased the victims on foot while shouting "death to faggots," and beat the victims with a billy club while responding "we kill faggots" when a bystander asked what the defendants were doing.

- A report by the National Gay and Lesbian Task Force of a letter from a person who wrote that she "was gang-raped for being a lesbian. Four men beat me, spat on me, urinated on me, and raped me . . . . When I reported the incident to Fresno police, they were sympathetic until they learned I was homosexual. They closed their book, and said, 'Well, you were asking for it.'"

- An article in the November 22, 1997, issue of *The Washington Post* about five Marines who left the

Marine Barracks on Capitol Hill to throw a tear gas canister into a nearby gay bar. Several persons were treated for nausea and other gas-related symptoms.

Although many states have enacted hate crimes laws, those laws do not protect all groups. For example, only 20 states include sexual orientation in their bias crimes statutes, only 18 states include gender, and only 20 states include disability.

Moreover, state and local law enforcement officials have often been hostile to the needs of gay men and lesbians. The fear of state and local police—which many gay men and lesbians share with members of other minorities—is not unwarranted. For example, until recently, the Maryland state police department refused to employ gay men or lesbians as state police officers. In addition, several months ago, a District of Columbia police lieutenant who headed the police unit that investigates extortion cases was arrested by the FBI for attempting to extort $10,000 from a married man seen leaving a gay bar. Police officers referred to the practice as "fairy shaking."

The problem of crimes based on gender is also persistent. For example, two women cadets at the Citadel, a military school that only recently opened its doors to female students, were singled out and "hazed" by male cadets who did not believe that women had a right to be at the school. Male cadets sprayed the two women with nail polish remover and then set their clothes ablaze, not once, but three times within a two-month period. One male cadet also threatened one of the two women by saying that he would cut her "heart out" if he ever saw her alone off campus.

Congress should pass properly drafted legislation that provides remedies against invidious discrimination and makes illegal discrimination by private organizations that exclude persons from access to fundamental rights or from the opportunity to participate in the political or social life of the community. The serious problem of crime directed at members of society because of their race, color, religion, national origin, gender, sexual orientation, or disability merits legislative action.

C. Legislative Conflict Between Religious Liberty and Civil Rights

During the 105th Congress, members of the House and Senate Judiciary Committees considered, but did not pass, the Religious Liberty Protection Act (RLPA), which would protect the exercise of religious beliefs from interference by state or local governments. An important issue that the 106th Congress will have to address is the prospect that defendants in civil rights cases could use RLPA as a defense to civil rights claims, particularly discrimination claims based on sexual orientation.

The RLPA would provide extensive statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1988 Supreme Court decision that lowered the standard of review for religious exercise claims. As reported out of the House constitution subcommittee, the RLPA provides, in relevant part, that:

> *a [state or local] government shall not substantially burden a person's religious exercise in a program or activity operated by a government, that receives federal financial assistance, even if the burden results from a rule of general applicability . . . [unless the] government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.*[4]

Other versions of the legislation apply the same test, but also rely on Congress' Commerce Clause authority.

Although the objective of enhancing the protection of the exercise of religious belief from governmental interference is important, several recent cases raise significant concerns that defendants in civil rights cases could use the RLPA as a defense to state or local civil rights claims. The RLPA does not have any specific provision for reconciling such potentially serious conflicts between a defendant's claim that religious belief motivated his or her discriminatory act, and a civil rights plaintiff's claim that state or local anti-discrimination statutes provide protection against such discrimination—regardless of the defendant's motivation. Consequently, without any further amendments, the RLPA could potentially jeopardize certain civil rights claims in at least some states, and will increase the litigation costs for civil rights plaintiffs even for those claims where an RLPA defense would be unsuccessful.

The scope of the potential problem is broad. In deciding housing discrimination claims based on marital status, several state supreme courts have recently considered whether religious liberty statutes or state constitutional provisions provide a defense to civil rights claims. The discussions in those recent decisions closely parallel older court decisions addressing discrimination based on characteristics such as race and sexual orientation, which applied the heightened constitutional scrutiny formerly applied to religious liberty challenges to state laws. In addition, witnesses during hearings in the 105th Congress before the House and Senate Judiciary Committees stated their belief that the RLPA could be used as a defense to civil rights claims based on gender, religion, sexual orientation, and marital status.

In applying standards of review substantially similar to the RLPA religious exercise standard, five state supreme courts have recently decided cases in which defendants raised a religious liberty defense to civil rights claims grounded on state or local fair housing laws protecting against discrimination on the basis of marital status.[5] In those housing cases, the rental properties at issue were not owner-occupied, but instead were used solely for investment purposes.[6] The landlords all claimed that their sincerely held religious beliefs about premarital sexual relations required them to deny housing to unmarried couples, despite state or local laws prohibiting housing discrimination on the basis of marital status. Although the religious liberty defense was not always successful, the courts were split on whether the anti-discrimination laws impose a substantial burden on the exercise of the landlord's religion, as well as on whether the governmental interest in eradicating marital status discrimination in housing is compelling.

Defendants in civil rights cases have also raised religious liberty defenses in cases involving such characteristics as race or sexual orientation and in contexts ranging from educational institutions to employment.[7]

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon v. Smith*,[8] the use of religious liberty defenses to civil rights claims was widespread.[9]

In addition, during recent congressional hearings, advocates for religious groups testified that the RLPA could be used as a defense to allow a sectarian vocational-tech school receiving federal funds to offer single-sex education, despite federal laws prohibiting sex discrimination in education; to permit a religiously affiliated day care center to discriminate on the basis of religion in hiring instructors; to permit employers with sincerely held religious beliefs to discriminate against gay men and lesbians in hiring employees, despite state or local laws prohibiting discrimination on the basis of sexual orientation; and to allow landlords with religious objections to refuse to rent to unmarried couples, despite state or local fair housing laws protecting against discrimination based on marital status. State and local laws also provide protection based on other characteristics that receive less than strict scrutiny, such as disability, familial status, or pregnancy.

Although the governmental interest in eradicating discrimination has usually been found to be compelling, providing a new defense in civil rights actions will—at a minimum—increase the cost of litigation for plaintiffs. However, the risk for persons claiming civil rights protection based on characteristics that receive lower levels of scrutiny is substantial. Because many of the groups claiming protection under state and local civil rights laws do not currently receive heightened scrutiny for their claims in court, and much or any explicit federal statutory protection from Congress, it is likely that at least some courts would find that the governmental interest in ending discrimination against these groups is not compelling. As noted above, the courts are divided on the question, and these decisions have come from states that traditionally have been vigorous and strict in enforcing their civil rights laws.

For these reasons, Congress should modify its approach to enhancing the protection of religious expression to ensure that any new statute does not eviscerate the protection provided by state and local civil rights laws.

D. Megan's Law Reform Legislation

The 106th Congress may continue consideration of legislation that then-Congressman Charles Schumer (D-NY) introduced in the 105th Congress, which would deprive states of certain federal funds if those states require persons convicted solely of consensual sexual offenses to register under state Megan's Law sex offender registration requirements.

The Schumer Amendment is an important gay rights issue because states historically have disproportionately prosecuted consensual sex offenses against gay men. In fact, one state began its sex offender register more than 50 years ago specifically to track gay men who were often convicted of nothing more than the "lewd conduct" of holding hands in a public park.

In its 1996 report accompanying the "Megan's Law" amendments to the Jacob Wetterling Act, the House Judiciary Committee stated that it was responding to "several recent tragic cases" of crimes against children and sexually violent crimes by imposing registration requirements on persons "who commit a sexual or kidnapping crime against children or who commit sexually violent crimes against any person (whether adult or child)." The Schumer Amendment would not alter the registration requirements for the offenses enumerated in the Jacob Wetterling Act, namely crimes against minors and sexually violent crimes.

The Schumer Amendment responds to several state statutes that impose the same sex offender registration requirements for persons convicted of consensual offenses—conduct that inarguably is not sexually violent and does not involve minors—as they do for violent sexual offenses. Specifically, six states (Alabama, Idaho, Louisiana, Mississippi, Missouri, and South Carolina) require persons convicted of nothing more than consensual adult sodomy to register as sex offenders.[10] In addition, several states require registration for minor offenses that have often been used to target gay men, such as "indecent exposure" and "disorderly person."[11]

Congress should pass legislation to ensure that states do not impose registration and public disclosure requirements on persons convicted of nothing more than consensual sexual offenses. Such persons should not be exposed to the severe consequences caused by Megan's Laws in depriving persons of privacy, imposing additional post-sentence punishment, and fostering vigilantism.

IV. Conclusion

The Clinton Administration has significantly advanced lesbian and gay rights, despite causing substantial harm to those rights by its positions on the military and marriage. The Administration has helped ward off anti-gay legislative attacks and supports legislative advances protecting persons based on sexual orientation. Finally, the President has also taken important steps, regardless of the actions of Congress, to further equality for gay men and lesbians.

Endnotes

[1] The ACLU did not endorse the Hate Crimes Prevention Act during the 105th Congress.

[2] United States v. Bledsoe, 728 F.2d 1094, 1098 (8th Cir. 1984), *cert. denied*, 469 U.S. 838 (1984).

[3] *Id.* at 1095, 1098.

[4] H.R. 4019, 105th Congress § 2(a)-2(b) (1998).

[5] See *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996) (hereinafter *FEHC*) ("marital status" includes unmarried heterosexual couples; no substantial burden on religious exercise found); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further consideration of whether the governmental interest is compelling); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) ("marital status" includes unmarried heterosexual couples; the government's interest in providing equal access to housing is compelling); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) ("marital status" does not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination); *Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. 1997) (governmental interest in eradicating discrimination in housing against unmarried couples was compelling), *vacated for lack of case or controversy*, 685 N.E.2d 622 (Ill. 1997).

[6] See *Desilets*, 636 N.E.2d at 238 n.8 (law applicable only to "dwellings that are rented to three or more families living independently of each other"); *Swanner*, 874 P.2d 274 (statute provides exception for individual home "wherein the renter or lessee would share common living areas with the owner"); *French*, 460 N.W.2d 2 (owner did not live in subject property, a two-bedroom house); *FEHC*, 913 P.2d at 912 (Smith "does not reside in any of the four units"); *Jasniowski*, 678 N.E.2d at 745 (renting a "building comprised of both commercial space and a residential apartment").

[7] See, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) (religious university claimed that its religious beliefs about miscegenation justified racial discrimination in admissions). See also *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a Virginia anti-miscegenation statute).

[8] 485 U.S. 660 (1988).

[9] See, e.g., *Bob Jones University*, 461 U.S. at 604; *U.S. Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house claimed that dismissing employee in retaliation for bringing discrimination charges was based on religious doctrine forbidding members of the church from bringing lawsuits against the church); *Walker v. First Orthodox Presbyterian Church*, 22 FEP Cases (BNA) 762 (Cal. 1980) (church dismissed gay organist because church doctrine forbids "unrepentant sinners" from taking a leadership role in musical services, despite city ordinance forbidding sexual orientation discrimination in employment); *Minnesota ex rel. McClure v. Sports & Health Club*, Inc., 370 N.W.2d 844 (Minn. 1985) (health club's owners insisted on hiring only employees whose religious beliefs were consistent with the owners' religious beliefs despite state anti-discrimination law forbidding employment discrimination based on religion, sex, and marital status); *Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C. App. 1987) (religious university argued that its religious beliefs justified the denial of "University Recognition" to gay student group despite a District of Columbia civil rights law prohibiting discrimination on the basis of sexual orientation).

[10] Ala. Code § 13A-11-200 (1994); Idaho Code § 18-8301(1)(a) (1997); La. Rev. Stat. Ann. § 15:542(E); Miss. Code Ann. § 45-33-1(4)(d) (1997); Mo. Ann. Stat. § 589.400-1(4) (West Supp. 1998); S.C. Code Ann. § 23-3-3-430(C) (Law. Co-op. Supp. 1997).

[11] See Ala. Code §§ 13A-11-200 to 11-203 (Michie 1994) (indecent exposure); Ariz. Rev. Stat. Ann. §§ 13-3821 to 3825 (West Supp. 1997) (indecent exposure); Cal. Penal Code §§ 290-291.5 (West Supp. 1998) (indecent exposure); Colo. Rev. Stat. Ann. § 18-3-412.5 (Supp. 1996) (indecent exposure); Del. Code Ann. tit. 11 § 4120, 4336 (1995) (indecent exposure); Idaho Code §§ 18-8301 to 8311 (Supp. 1998) (indecent exposure); Iowa Code §§ 692A.1 to .15 (Supp. 1998) (indecent exposure); Mass. Gen. Laws Ann. ch. 6 §§ 178c - 180o; ch. 22c § 37 (West. Supp. March 1998) (lewd and lascivious behavior); Mich. Comp. Laws. Ann. §§ 28.721 to 732 (Supp. 1998) (indecent exposure and "disorderly person," including public intoxication, vagrancy, and loitering); Mont. Code Ann. §§ 46-23-501 to 511 (1997) (indecent exposure); Nev. Rev. Stat. §§ 179D.35-179D.850 (Supp. 1997) (indecent exposure); Okla. Stat. Ann. tit. 57 §§ 581 to 588 (Supp. 1998) (indecent exposure); S.D. Codified Laws §§ 22-22-30 to 41 (Michie 1998) (indecent exposure).

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Working Papers

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A Civil Rights Struggle for the Ages: Why the Administration Must Fight to Save Its Census 2000 Plan

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Voting

Chapter IX

Enforcing Voting Rights in the Clinton Administration As We Approach the New Millennium

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Affirmative Action

Chapter XIII

Affirmative Action: Victories to Celebrate ... and a Long Road Ahead

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Chapter XV

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Religious Discrimination

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